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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

GEORGE A. ANGLE, d/b/a KANSAS REFINED HELIUM COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and OIL, CHEMICAL AND ATOMIC WORKERS, INTERNATIONAL UNION, AFL-CIO,
Respondents.

APPENDIX

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INDEX

Judgment, United States Court of Appeals for the District of Columbia Circuit, September 10, 1971 ..... A1

Order on Petitions for Review and Cross-Application for Enforcement of Orders of the National Labor Relations Board A3

Decision and Order (Cases 17-CA-3021, 17-CA-3021-2) A22

Trial Examiner's Preliminary Decision A26

Trial Examiner's Supplemental Decision ..... A 84

Trial Examiner's Decision and Report A125

Decision and Order (Case 17-CA-3378) A138

Trial Examiner's Decision A140

Decision and Direction of Election (Case 17-RC-5126) ..A167

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent. GEORGE A. ANGLE, d/b/a KANSAS REFINED HELIUM COMPANY, Intervenor	No. 23,295 No. 23,300
* * *	
GEORGE A. ANGLE, d/b/a KANSAS REFINED HELIUM COMPANY, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 23,750 No. 23,751

JUDGMENT

(Filed September 10, 1971)

Before: McGowan and Tamm, Circuit Judges, and Matthews,* Senior District Judge.

The above cases came on to be heard upon petitions to review, and on cross-application for enforcement of, orders of the National Labor Relations Board dated June 25, 1969, against George A. Angle, d/b/a Kansas Refined Helium Company, its officers, agents, successors, and assigns. The Court heard argument of respective counsel

*Sitting by designation pursuant to Title 28, U.S. Code Section 294(c).

on November 3, 1970, and has considered the briefs and transcripts of records filed in these cases. On May 27, 1971, the Court being fully advised in the premises handed down its opinion denying the petitions for review and granting enforcement of the Board's said orders.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the District of Columbia Circuit, that the said orders of the National Labor Relations Board be, and the same are hereby enforced; and that George A. Angle, d/b/a Kansas Refined Helium Company, its officers, agents, successors, and assigns, abide by and perform the direction of the Board in said orders contained.

/s/ Carl McGowan
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

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Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ Burnita Shelton Matthews
Senior District Judge, United States Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,295

No. 23,300

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

GEORGE A. ANGLE, d/b/a KANSAS REFINED HELIUM COMPANY, INTERVENOR

No. 23,750

No. 23,751

GEORGE A. ANGLE, d/b/a KANSAS REFINED HELIUM COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITIONS FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

Decided May 27, 1971

(Judgment Entered September 10, 1971)

Mr. Jerry D. Anker for petitioner in Nos. 23,295 and 23,300

Mr. Marvin J. Martin, with whom *Mr. W. Stanley Churchill* was on the brief, for petitioner in Nos. 23,750 and 23,751 and intervenor in Nos. 23,295 and 23,300.

Mr. Joseph E. Mayer, Attorney, National Labor Relations Board, for respondent. *Messrs. Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, *Marcel Mallet-Prevost,* Assistant General Counsel, *Allison W. Brown, Jr.,* and *Harold B. Zanoff,* Attorneys, National Labor Relations Board, were on the brief for respondent.

Before: McGOWAN and TAMM, *Circuit Judges,* and MATTHEWS,* *Senior District Judge.*

McGOWAN, *Circuit Judge*: These petitions for review, filed by the union (Oil, Chemical and Atomic Workers International, AFL-CIO) and the employer (Kansas Refined Helium Company), bring before us two related orders of the National Labor Relations Board. The Board has also filed a cross-petition for enforcement. Finding upon examination of the numerous issues raised that the Board has committed no errors of law and that its findings are amply supported by substantial evidence, we deny both petitions for review and grant the Board's request for enforcement.

I

The issues presented here arise from a fact pattern which has become familiar to this court and to the other Courts of Appeals in reviewing the Board's unfair labor practice decisions. The dispute in this instance arose under the following circumstances. Shortly after the employer took over the operation of a newly constructed

*Sitting by designation pursuant to Title 28, U.S. Code Section 294(c).

helium plant, the union with the assistance of several key employees launched a campaign to organize the plant's production and maintenance personnel. The union quickly obtained signed union authorization cards from 18 of the 22 employees involved. Upon being notified that a majority of its employees had signed cards designating the union as their collective bargaining representative, the employer called for a formal election to be conducted by the Board.

During the months before the scheduled election the employer, through the conduct of its sole owner, engaged in numerous activities in an apparent effort to dissipate employee enthusiasm for union representation. The Trial Examiner found that the employer had committed unfair labor practices in violation of Section 8(a)(1) of the Labor Management Relations Act, 29 U.S.C. § 158(a)(1) (1964), by coercively interrogating each employee in the plant, by making statements to several of its employees indicating an animus toward the union, and by making veiled threats against the union and its sympathizers in a speech at a dinner given for all the employees. The Examiner also found violations of Sections 8(a)(3), (5), and (1) of the Act, 29 U.S.C. §§ 158(a)(3), (5), (1) (1964), in (a) the discriminatory discharge of 6 pro-union employees, (b) the granting of a unilateral wage increase immediately prior to the date scheduled for the election, and (c) the persistent refusal to bargain with the employees' designated representative. The Board approved each of the Examiner's conclusions, 176 N.L.R.B. No. 115, and since, viewed as a whole, the record amply reflects the existence of substantial supporting evidence, we affirm the Board's findings.[1]

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1. A collateral issue relevant to the first Board order is whether the Examiner erred in failing to hear the testimony of

The second Board order under review, 176 N.L.R.B. No. 116, deals exclusively with the suspension and second discharge of one of the 6 pro-union employees who had been previously discharged and reinstated. The Trial Examiner and the Board found that this discharge constituted an unfair labor practice offending Sections 8(a)(3), (4), and (1), 29 U.S.C. §§ 158(a)(3), (4), (1) (1964). This finding is also clearly founded upon substantial evidence, and we leave it undisturbed.

In so sustaining the Board's orders as against the claims of error pressed upon us by the employer,[2] the single substantive issue meriting extended exposition is the "aging but nevertheless persistently vexing problem of whether or not an employee is a supervisor."[3] That inquiry here focuses on the status of the plant's "senior operators."

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one of the employees. Although employee Garrett was not called as a witness at the initial unfair labor practice hearing, after issuance of the Examiner's Preliminary Decision the Board granted the employer's request to reopen the hearing to take his testimony. After remand to the Examiner, however, it was discovered that Garrett was suffering from serious mental and emotional difficulties and, based upon the testimony of two psychiatrists, the Examiner concluded "that Garrett was, and would continue to be, physically and emotionally unable to testify without substantial risk to his mental stability." Weighing this along with the considerations that Garrett's testimony did not appear critical and, indeed, because of his protracted emotional disturbance, would be of doubtful credibility, the Examiner recommended that the Board rescind its order requiring the reopening of the hearing. The Board complied. Since on this record we do not believe that the employer's case was seriously prejudiced, we find the Board's decision, based on the Examiner's evaluation of the matter, to be unobjectionable.

2. We reserve to the third section of this opinion our examination of the several issues raised with regard to the remedies employed by the Board in this proceeding.

3. NLRB v. Security Guard Serv., Inc., 384 F.2d 143, 145 (5th Cir. 1967).

II

The Labor Management Relations Act in terms confers upon *employees* the rights of self-organization, collective bargaining through chosen representatives, and engaging in concerted activities for their mutual benefit. Section 7, 29 U.S.C. § 157 (1964). The Act further protects *employees* from the unfair labor practices of their employers which interfere with those rights. Section 8 (a), 29 U.S.C. § 158(a) (1964). Section 2 (3), as pertinent to our consideration, defines the term "employee" as follows: "The term 'employee' shall include any employee . . . but shall not include . . . any individual employed as a supervisor . . . ." 29 U.S.C. § 152(3) (1964). Given this statutory framework, it is critical, both in ascertaining the appropriate bargaining unit and in evaluating allegations of unfair labor practices, to determine whether particular individuals are "employees" or "supervisors."[4] Quite understandably, this statutory dichotomy has spawned substantial Board and appellate liti-

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4. The import of the distinction is made unmistakably clear in Section 14(a) of the Act:

> ". . . no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purposes of any law, either national or local, relating to collective bargaining."

29 U.S.C. § 164(a) (1964). Prior to 1947 the National Labor Relations Act appeared to treat all employees alike, drawing no lines between the rank and file employees and those more closely associated with management. The Board, however, had studiously avoided holding one way or the other on the question. When, in Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947), the Supreme Court dissolved all doubts by definitively holding that supervisors were employees under the Act, Congress immediately responded with the amendments (known as the Taft-Hartley Act) which, among other things, clearly defined supervisors as non-employees. *See* S. REP. No. 105, 80th Cong., 1st Sess. (1947); H. R. REP. No. 245, 80th Cong., 1st Sess. (1947).

gation. The statutory definition with which we deal reads in full:

> "The term 'supervisor' means any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment."

Section 2(11), 29 U.S.C. § 152(11) (1964).

The Board found the class of employees in question here not to be supervisors. In applying the statutory test to the factual setting of this case, the Board's decision is, of course, entitled to great weight. The substantial evidence standard for review of agency fact determinations (Sections 10(e), (f), 29 U.S.C. §§ 160(e), (f) (1964)) takes on special significance where the issue lies so squarely within the Board's ambit of expertise. On this score we find ourselves in firm agreement with a recent opinion by Judge Waterman of the Second Circuit:

> "Inasmuch as infinite variations and gradations of authority can exist within any one industrial complex and any drawing of the line between the personnel of management and the rank and file workers may require some expertise in evaluating actual power distributions which exist within an enterprise, the Board's findings relevant thereto are entitled to great weight."

NLRB v. *Metropolitan Life Ins. Co.*, 405 F.2d 1169, 1172 (2d Cir. 1968). *See also Food Store Employees Union, Local 347* v. *NLRB*, 137 U.S.App.D.C. 248, 253, 422 F.2d 685, 690 (1969); *Amalgamated Clothing Workers* v. *NLRB*, 137 U.S.App.D.C. 93, 97, 420 F.2d 1296, 1300 (1969). With that limitation on our review power in mind, we turn to

a consideration of the facts underlying the Board's decision.

Kansas Refined Helium Company is a highly automated plant engaged primarily in the process of extracting helium from natural gas. The facility is in operation around the clock, seven days a week, and is staffed by approximately 25 persons spread out over three successive shifts. Filling the top positions of responsibility are the plant manager, the operations and engineering manager, and the chief of maintenance. These three fall clearly within the management echelon and there is no controversy as to their supervisory status. The remainder of the employees, with the exception of several repair and maintenance personnel, are classified as either senior or junior operators. It is the status of the four senior operators, all of whom signed union authorization cards and some of whom participated in soliciting signatures from other employees, which is the critical issue in this proceeding.

The responsibilities of the "operating" employees—the senior and junior operators—consist primarily of observing the indicators and gauges, which reflect the progress of the various stages in the refining process, and of making adjustments as necessary. On each shift there is one senior operator and either two or three junior operators. Generally the senior operator stations himself in the main control room in front of the central indicator board; the junior operators move throughout the plant performing other routine functions such as checking machinery and controls in the outbuildings. The standard operating activities of both the senior and junior operators are performed in accordance with an instructional manual known as the "blue book." Any nonroutine instructions, required to take care of unusual circumstances, are assigned

by the three managerial supervisors. Communication of such special instructions from one shift to the next is accomplished through notations penciled into the "special orders book" by the assigning manager. This book is periodically consulted by all operators. One of the responsibilities of each senior operator is to ascertain that the junior operators on his shift have fulfilled any such special assignments.

Because of the full-time operation of the plant, there are many hours during the day when the managerial supervisors are not present. The employer has relied heavily in these proceedings on this fact as indicating that, at least during substantial segments of any workday, the senior operators do have the obligation "responsibly to direct" the junior operators on their shifts. It is clear, however, that all but the routine directives come directly from the plant managers rather than from the senior operators. Furthermore, there is ample evidence that, in cases of emergency, or whenever unusual circumstances have arisen at the plant, the senior operators were instructed to communicate with the plant manager rather than to exercise "independent judgment." Under these circumstances slight weight can be given to the consideration that senior operators are often on duty with no supervisor over them. *Compare Ohio Power Co.* v. *NLRB,* 176 F.2d 385, 386 (6th Cir.), *cert. denied,* 338 U.S. 899 (1949) (broad emergency power), *with NLRB* v. *Security Guard Serv.,* 384 F.2d 143, 148 (5th Cir. 1967), and *United States Gypsum Co.,* 116 N.L.R.B. No. 91, 1956-1957 CCH NLRB Dec. ¶ 54,013, at 53,946-47 (no emergency power).

In addition to its argument regarding the full-time nature of plant operations, the employer directed the Board's attention to a number of other factors which it contends lead inescapably to the conclusion that the four

senior operators are within the supervisory structure. Great reliance is placed on the pay differential between the two classes of operators: the seniors receive 80 to 85 cents more per hour than their junior counterparts. The employer's position is that, since the plant's training program is the same for both classes and since junior's operators not infrequently perform the senior operator's tasks in his absence, thereby tending to show that their skills are comparable, income disparity cannot be accounted for in any way other than as a reflection that the company is compensating the senior operators for their added responsibilities in exercising authority and control over the junior operators.

The Trial Examiner rejected this thesis, finding that the pay difference could be fairly attributed to other factors, such as the senior operators' seniority in length of service over most of the junior operators. It is also reasonable to conclude, as the Trial Examiner did, that the pay of senior operators simply reflects the value to the employer of the technical responsibilities performed in the plant's "nerve center." Furthermore, we have discovered no cases in which disparities in compensation were accorded litmus paper significance in the absence of solid evidence of the actual possession of supervisory responsibility. *See, e.g., United States Gypsum Co., supra,* at 53,947. Such evidence is lacking in this record.

While the employer conceded before the Board that "the senior operators did [not] actually suspend, lay-off, recall, promote, transfer or discharge" employees, it contended that senior operators could "effectively recommend" wage increases for junior operators and could also "effectively recommend" disciplinary action where necessary. The testimony of the plant manager is, we think, dispositive against the employer on both counts. On the

question of disciplinary action, the plant manager testified that he had informed the senior operators that, although their recommendations would receive considerable weight, in cases of disciplinary controversies they were to take no direct action themselves but were instead to call the plant manager who would come to the plant immediately. As to the question of whether senior operators exercised supervisor-type functions with respect to wage increases, the evidence is that only one of the four senior operators had ever recommended pay raises for the junior operators on his shift. And, in that isolated instance, plant-wide wage increases had already been contemplated and the decision to grant the raises was made by the plant manager without appreciable reliance on the senior operator's evaluation. We think the Board's decision that no supervisory power was visible in these areas of the senior operators' activities finds substantial support in the record and warrant in the case law. *Compare NLRB* v. *Southern Bleachery & Print Works, Inc.*, 257 F.2d 235, 238 (4th Cir. 1958), *cert. denied*, 359 U.S. 911 (1959) (machine printers not supervisors), *with NLRB* v. *Metropolitan Life Ins. Co., supra* at 1174-77 (watch engineers are supervisors).

Finally, the Trial Examiner considered the several notices and directives which had been posted in the plant from time to time, and which were offered as indicators of management's view of the senior operators' role in the operation of the facility. Included in those notices were statements indicating that senior operators were to be "responsible" for their shift, that they were to "supervise the personnel on [their] shift," that a particular senior operator had been assigned "to run the fourth shift," and that each senior operator "shall follow up these instructions and see that the employees take care of [par-

ticular tasks]."[5] Ordinarily we would find such internal memoranda and notices to be of substantial probative worth when, as here, they were prepared and circulated prior to the time that any campaign had been undertaken within the company to designate the union as the employees' bargaining representative. In such an atmosphere, untainted by live controversies over the statutory status of any particular group of employees, management's statements conferring responsibilities and allocating duties are likely to be more reliable than similar statements made in the context of union conflict when directives are often addressed as much to the Board as they are to the company's personnel.

While most of the company notices relied on here were posted prior to the advent of labor disputes, the Board nonetheless found them unpersuasive because they were unsupported by evidence that they constituted anything more than naked designations of "paper power." We agree that, beyond the the statements or directives themselves, what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority. In *NLRB* v. *Security Guard Serv., Inc.*, 384 F.2d 143, 149, the Fifth Circuit succinctly stated the essential point:

> ". . . What is amiss with this argument which is based on paper credentials is that there is a lack of actual

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5. One of the notices indicated that senior operators were to approve the timecards of junior operators on their shifts. The employer cites this responsibility as further evidence of their superior status. The record shows, however, that no particular significance attached to the senior operator's signature since no card was valid until the plant manager had approved it. At any rate, the function of timecard approval does not convert an employee into a supervisor. *See, e.g.*, NLRB v. Southern Bleachery & Print Works, Inc., *supra*, at 238.

> authority to match. The concept of supervision has some elasticity, but it must have substance and not be evanescent. . . . A supervisor may have potential powers, but theoretical or paper power will not suffice. Tables of organization and job descriptions do not vest powers. . . ."

See also Food Store Employees Union, Local 347 v. *NLRB, supra* 137 U.S.App.D.C. at 253, 422 F.2d at 690; *NLRB* v. *American Oil Co.*, 387 F.2d 786 (7th Cir. 1967).

The employer, challenging the Examiner's refusal to draw controlling inferences of supervisory responsibility either from such internal directives or from testimony offered by company witnesses, accuses the Board of violating a judicial rule employed in evaluating personnel status, *i.e.*, that it is the *existence* of any of Section 2(11)'s enumerated powers, rather than their *exercise*, that is critical. *See, e.g., West Penn Power Co.* v. *NLRB*, 337 F.2d 993, 996 (3d Cir. 1964); *Ohio Power Co.* v. *NLRB, supra* at 388. The language on which the employer relies as showing that the Examiner and the Board have fallen into error is the statement, found in the former's Preliminary Decision, that "where the facts concerning supervisory status are in dispute, as they are here, I regard evidence of supervisory power exercised—or not exercised —as far more persuasive than self-serving testimony concerning their mere conferral."

It is a well settled proposition, mandated by the statute, that, once the existence of supervisory authority is established, the degree or frequency of its exercise is of little consequence. We do not, however, read the Examiner's opinion as quarreling with that proposition. On the contrary, it is the very issue of the existence of authority on which his inquiry is focused. The thrust of his conclusion is that, while numerous allegations of supervisory

authority have been made, the nearly total lack of evidence of authority actually exercised negates its existence. *See NLRB* v. *Southern Bleachery & Print Workers, Inc., supra* at 239; *NLRB* v. *Leland-Gifford Co.*, 200 F.2d 620, 625 (5th Cir. 1952). We do not see how the Examiner could have concluded otherwise in the face of the clear mandate of Section 2(11) that a supervisor is not merely one who has "authority" to act in the interest of the employer but is one who, in the "*exercise* of such authority," is required to use "independent judgment." On this record we find substantial evidence to support the finding that the senior operators were not supervisory personnel within the contemplation of the statute but were merely "lead men"[6] among the operating employees on each shift. Our affirmance of the Board's order is not therefore, precluded by this claim of supervisory status.[7]

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6. *See, e.g.*, Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers v. NLRB, 111 U.S.App.D.C. 383, 389, 298 F.2d 297, 303 (1961), *cert. denied*, 369 U.S. 843 (1962); Plumbing & Pipefitting Union v. NLRB, 109 U.S.App.D.C. 315, 323, 287 F.2d 354, 362 (1961).

7. The employer has also sought to make much of the established interpretation of Section 2(11) which requires that its clauses be read disjunctively, i.e., that the existence of any one of the enumerated supervisory powers is conclusive of the status question. *See, e.g.*, NLRB v. Fullerton Publishing Co., 283 F.2d 545, 548 (9th Cir. 1960); Ohio Power Co. v. NLRB, *supra* at 287. In its reply brief the employer characterized this interpretation as the "majority" view and alleged that the Board had in this case rejected that approach and had instead referred to the clauses of the definition as if they constituted merely a "guide" rather than a "checksheet" of pertinent indicia. In so doing it was charged by the employer with having followed the decidedly "minority" view of this jurisdiction. Food Store Employees Union, Local 347 v. NLRB, *supra* 137 U.S.App.D.C. at 253, 422 F.2d at 690. This contention lacks merit. The Examiner at no point purported to reject the disjunctive operation of the statute. Indeed, since he found no one of the enumerated supervisory powers to exist, he was not called on to decide whether a finding

III

In addition to our conclusions that there is substantial evidence to support the Board's findings both as to unfair labor practices and as to the status of the senior operators, we find the several remedies fashioned by the Board to be appropriate. The major remedial measures imposed included orders that the employer (1) cease and desist from its unlawful practices, (2) recognize and bargain with the union, (3) reinstate the discharged employees, and (4) award back pay to the dischargees computed in the customary manner.

First, the union has contested the determination that the dischargees' back pay award is to be limited to *net* back pay (back pay offset by interim earnings at other employment) rather than *gross* back pay. The union's argument, that only full back pay would "effectuate the purposes of the Act" as required by Section 10(c), 29 U.S.C. § 160(c) (1934), rests on two propositions.[8] The union first points out that net back pay is always inadequate because it can never make a discharged employee whole. This is so because the remedy fails to take into account such factors as inflation, the humiliation of being fired, and the frustration of searching for another job. Furthermore, the 6 percent interest allowed fails to recoup the interest that a discharged employee might have been forced to pay on money borrowed to sustain himself

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of any one of them would have been sufficient. Apart from the Board's actions, we do not read our own decisions, which seek simply to eschew a wooden application of the statute, to be inconsistent with the practice elsewhere. For a valuable discussion of the statute, rationalizing its disjunctive and conjunctive aspects, see NLRB v. Security Guard Serv., 384 F.2d 143, 147-51 (5th Cir. 1967).

8. The union was joined by the Board's General Counsel in pressing this contention upon the Trial Examiner in the first unfair labor practice hearing.

and his family during the period of joblessness. Nor does net back pay make allowance for such intangibles as the loss of credit occasioned by the dischargee's inability to maintain payments on debts incurred prior to his discharge. The union's second point is that the Board's refusal to invoke a remedy which fully compensates discharged employees discourages them, and all employees generally, from exercising to the fullest extent their statutory rights. An employee who knows that the Board's actions will not fully protect him in the event of an unlawful discharge will be, to that extent, reluctant to assert his rights in their fullest range.

While the reasoning of this challenge to the customary net back pay remedy would appear to have equal applicability to all reinstatement orders, the union asks that this standard remedy be laid aside in favor of full back pay only in cases in which the employer's conduct has been "particularly egregious," as the union contends that the employer's conduct in this proceeding has been. The Trial Examiner, after careful consideration of the union's contentions, concluded that under the facts of this case the requested remedy was neither necessary nor appropriate to effectuate the Act's policies.[9] In support of that

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9. The union contends that this case must be remanded to the Board for reconsideration in light of International Union of Electrical, Radio & Machine Workers v. NLRB, 138 U.S.App.D.C. 249, 253-59, 426 F.2d 1243, 1247-53 (1970), *cert. denied*, 400 U.S. 950 (1971) (Tiidee Products), and UAW v. NLRB, Nos. 24,557, 24,715 (D.C. Cir. March 19, 1971) (Ex-Cello-O Corp.). *Tiidee* and *Ex-Cell-O* hold that the Board is authorized under Section 10(c) to provide compensatory relief, over and above the customary cease-and-desist order, to make employees whole in cases characterized by the employer's brazen refusal to bargain. The unions in both cases claimed that compensation, for any period of protracted frivolous litigation designed by the employer to postpone the date on which the union would be recognized, should have been computed on the basis of

conclusion he pointed out that there was no evidence of record that the employer had such a history of violations that only a more drastic remedial measure could assure compliance with the Act. His decision was buttressed by his further conclusion that the proposal to eliminate the interim earning offset was more punitive than remedial, and that punitive remedies "have not been considered authorized by the Act."

The union readily agrees that the Board's powers are remedial in nature and that it "could not award gross back pay for the purpose of punishing the employer." *See Republic Steel Corp.* v. *NLRB*, 311 U.S. 7 (1940); *Carpenters Local* v. *NLRB*, 365 U.S. 651, 655 (1961). The

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an estimate of the benefits the employees would likely have derived from good faith bargaining.

The remedy sought in this proceeding and the Board's treatment of it are sufficiently different to take this case out of the *Tiidee-Ex-Cell-O* context. First, while the union does claim that net back pay fails to effectuate the policies of the Act, it does not contend that the remedy has the effect of positively encouraging the employer to delay in offering reinstatement or to engage in other acts antithetical to the policies of the Act. *See* NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 347-48 (1953). Nor does this case raise the spectre, present in the other cases, of a Board remedy which, in effect, encourages the employer to continue his refusal to bargain, thereby frustrating a central policy of the Act favoring collective bargaining. Second, the Board was not content in this case to reject the union's remedial argument on the ground that the relief it sought was not the customary one. On this record we cannot take seriously any claim that the Board refused to exercise its discretion in arriving at an effective remedy.

For these reasons we find it unnecessary to delay the finality of our judgment in this case in order to permit the union to petition this court for reconsideration in light of developments since this case was argued in November, 1970. *See* I.L.G.W.U. v. NLRB, Nos. 23,457, 23,562, 23,653 (D.C. Cir., Nov. 9, 1970) (Marie Phillips, Inc.); United Steelworkers v. NLRB, Nos. 23,551, 23,709 (D.C. Cir., July 10, 1970) (Quality Rubber Mfg. Co.).

union further concedes that full back pay is not more directly responsive to the sorts of collateral and intangible harms suffered by discharged employees than is net back pay; its claim is that the former provides "more complete compensation" for the employees' losses. While the union persistently asserts that its proposed remedy falls well on the permissible side of the thin line between compensation and punishment, it makes no effort to place a dollar figure on the inadequacies of net back pay. Nor does it attempt to qualify the difference, as to these discharged employees, between net and gross. In light of the union's contention that the remedy should only obtain in cases of egregious employer conduct, we cannot fault the Board for viewing the *full* back pay alternative, at least based on the union's showing here, as essentially punitive. Contrarily, the *net* back pay order entered in this case cannot, on this record, be said to be "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969), *quoting NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346-47 (1953).[10]

The employer has attacked another facet of the Board's remedial order—the bargaining order. A brief recapitulation of the events of the months following the summer

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10. *See* United Steelworkers v. NLRB, ... U.S.App.D.C. ....., 436 F.2d 908 (1970). We also reject the union's claim that the one employee who was twice discriminatorily discharged should be given the option either to accept reinstatement, or to reject it and continue to receive back pay until he finds suitably equivalent employment elsewhere. The union's contention that employer animosity is so great that a responsible working relationship could not be re-established at this time is unpersuasive. At any rate we have not been shown that reinstatement coupled with net back pay is ineffective to effectuate the policies of the Act.

of 1966 is essential to an understanding of the employer's claim. Because of the numerous unfair labor practices engaged in by the employer prior to the election scheduled for late September of 1966, the election was postponed indefinitely by order of the Board's Regional Director. Shortly thereafter the unfair labor practice complaint was filed, and on December 22, 1966, pursuant to the terms of Section 10(j), 29 U.S.C. § 160(j) (1964), the Regional Director filed a petition for a temporary injunction in the federal district court for Kansas. After a full hearing that court issued an injunction in April, 1967. *Angle* v. *Sacks*, 55 CCH Lab. Cas. ¶ 11,865 (D.Kan. 1967). With slight modification that decision was affirmed by the Court of Appeals for the Tenth Circuit, 382 F.2d 655 (1967). Essentially the injunction ordered the employer to refrain from engaging in any further antiunion conduct and, pending resolution of the complaint on the merits, to reinstate four of the employees whose discharges were believed to be illegal.

The employer's argument now is that, once the Board had obtained a Section 10(j) injunction, it could not thereafter seek a bargaining order in the complaint proceeding, but was restricted to seeking a cease and desist order. The employer's rationale proceeds from the premise that the purpose of an injunction in cases of this sort is to preserve the status quo pending an election, *i.e.*, to maintain the conditions necessary to assure that the election result reflects the true, undistorted view of the employees. On the other hand, because of the strong preference for free elections, bargaining orders are appropriate only when it is demonstrated that an atmosphere conducive to the untrammeled elective process does not exist. Therefore, so the argument goes, once an injunction has been obtained the conditions essential for a valid election are

assured, and the Board is precluded from asserting that such conditions do not exist.

The employer attempts to rest its case for the mutual exclusivity of injunctions and bargaining orders on the Supreme Court's recent discussion of bargaining orders in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 610-15 (1969). We, contrarily, find in that opinion the refutation of so strict a limitation on the Board's expert discretion. The Court made clear that it was the Board's responsibility to ascertain on a case-by-case basis whether in fact conditions were not conducive to a "fair and reliable election." *Id.* at 614. Certainly the Board may not ignore its function merely because an injunction against unfair labor practices has been obtained. Furthermore, this case would appear to provide a particularly poor vehicle for raising this novel remedial limitation since the Board did in fact find violations of Sections 8(a)(3) and 8(a)(4) *after* the entry of the injunction. As the Court in *Gissel* made clear, "a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct." *Id.* at 612. This being so, the scope and impact of the two remedies can rarely be expected to be coextensive.

The near converse of the employer's argument—that the pendency of a refusal to bargain complaint obviates the need for injunctive relief—was considered and rejected by the district court in the injunction proceedings in Kansas. *See Sacks* v. *Angle*, *supra* at 18,820-21. We reject its counterpart here.

We have considered the other contentions pressed by the employer in its petitions for review in Nos. 23,750 and 23,751, and find them to be without merit. Consequently we deny the review petitions of both the union

and the employer, and grant the Board's application for enforcement of its orders.

It is so ordered.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Cases 17-CA-3021

17-CA-3021-2

GEORGE A. ANGLE, d/b/a KANSAS REFINED HELIUM COMPANY

and

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

(Judgment Entered June 25, 1969)

On September 12, 1967, Trial Examiner Sidney D. Goldberg issued his Preliminary Decision in the above-entitled cases finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Preliminary Decision.[1] Thereafter, the Respondent and the Charging Party filed exceptions to the Trial Examiner's

1. Decision with respect to Section 8(a)(5) allegations of the complaint was deferred by the Trial Examiner.

Preliminary Decision, and supporting briefs, and the Charging Party filed a request for oral argument.[2]

Previously, on March 8, 1967, Respondent filed with the Trial Examiner a motion to reopen the record and for further hearing to take the testimony of Thomas E. Garrett, an employee who allegedly gave false testimony in a Board instituted court proceeding, bearing on certain credibility resolutions and recommendations of the Trial Examiner. By Order dated March 15, 1967, the Trial Examiner denied Respondent's motion. The Respondent having duly excepted to the Trial Examiner's rulings in that regard, the Board, by Order dated January 30, 1968, directed that the record be reopened and the case remanded to the Trial Examiner for the purpose of taking Garrett's testimony. On December 30, 1968, Trial Examiner Sidney D. Goldberg issued his Decision and Report finding, on the basis of expert medical testimony, that Garrett was, and would continue to be, physically and emotionally unable to testify without substantial risk to his mental stability and recommending that the Board rescind its Order of January 30, 1968, and proceed to its consideration of Respondent's exceptions to the Trial Examiner's Preliminary Decision upon the record now before it. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and Report, and a supporting brief, and the General Counsel filed an answering brief.[3]

On December 20, 1967, Trial Examiner Sidney D. Goldberg issued his Supplemental Decision in the above-enti-

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2. The Respondent's request for oral argument before the Board is hereby denied as the record and briefs adequately present the issues and positions of the parties.

3. In view of Garrett's mental condition, his testimony, if taken, would not add or detract from the record.

tled cases finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of Section 8(a)(5) of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Supplemental Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Supplemental Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearings and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decisions, and the entire record in these cases, including the exceptions and briefs, and hereby adopts the findings, conclusions,[4] and recommendations[5] of the Trial Examiner.

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4. In essential agreement with the Trial Examiner, we conclude that Respondent violated Section 8(a)(5) of the Act by rejecting the Union's bargaining demand and, thereafter, upon the Union's filing of a petition for an election, embarking upon an antiunion campaign marked by massive and systematic violations of Section 8(a)(1) and (3) of the Act. Those violations, which included, *inter alia,* coercive interviews with virtually every employee, threats of plant closure and discharge for union activity, and the discharge of six union supporters, were obviously designed to undermine the Union's support, destroyed the conditions necessary to the holding of a free election on the Union's petition, and made the holding of a fair election in the future unlikely. For these reasons, we conclude that, in order to protect the statutory rights and interests of employees and to remedy the unfair labor practices committed, it is essential that the Respondent be ordered to recognize and bargain with the Union as the statutory representative of its employees for the

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Orders of the Trial Examiner, and orders that Respondent, George A. Angle, d/b/a Kansas Refined Helium Company, Otis, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Orders.

IT IS FURTHER ORDERED that the Board's Order of January 30, 1968, remanding the case to the Trial Examiner for the purpose of taking further testimony be, and it hereby is, rescinded.

Dated, Washington, D.C. Jun 25 1969

John H. Fanning, Member
Howard Jenkins, Jr., Member
Sam Zagoria, Member

(Seal) National Labor Relations Board

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purposes of collective bargaining. *N.L.R.B.* v. *Gissel Packing Company*, ____ U.S. ____ (June 16, 1969).

5. We agree with the Trial Examiner's recommendation that Sims be reinstated because there is no evidence to show conclusively that Sims engaged in misconduct.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Cases 17-CA-3021

17-CA-3021-2

GEORGE A. ANGLE, doing business as KANSAS REFINED HELIUM COMPANY,
Respondent

and

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,

Charging Party

Gerald A. Wacknov, Esq., and R. L. De Prospero, Esq., for the General Counsel.

Patrick F. Kelly, Esq., of Wichita, Kans. (*Frank and Kelly*), for the Charging Party.

Marvin J. Martin, Esq., and *W. Stanley Churchill, Esq.*, of Wichita, Kans. (*Martin & Wooley*), for the Respondent.

TRIAL EXAMINER'S PRELIMINARY DECISION

SIDNEY D. GOLDBERG, Trial Examiner: In this consolidated proceeding, under Section 10(b) of the National Labor Relations Act, as amended (herein called the Act), the complaint[1] alleges that George A. Angle, in the

1. Issued November 16, 1966, on charges filed September 21 and 22, 1966, and an amended charge filed November 1, 1966. It was thereafter amended November 23, 1966, and at the hearing.

operation of his enterprise under the name Kansas Refined Helium Company (herein sometimes called Respondent, KRH, or the Company), interfered with, restrained, and coerced employees in their exercise of rights guaranteed them in the Act; discriminatorily discharged six employees to discourage their membership in the Oil, Chemical and Atomic Workers International Union, AFL-CIO (herein called the Union), and, although the Union was the designated collective-bargaining representative of his employees in an appropriate unit, refused to bargain with it, thereby violating Section 8(a)(1), (3), and (5) of the Act.

Respondent answered, admitting that he had discharged the six named employees but denying that he had, in any manner, violated the Act.

A hearing on the issues so raised was held before me on January 18, 19, and 20, 1967, at Great Bend, Kansas, at which all parties were represented, afforded an opportunity to adduce evidence, cross-examine witnesses and argue upon the facts and the law. Briefs thereon were subsequently filed by the General Counsel and by counsel for Respondent. Several posthearing motions were made by Respondent to reopen the record to take additional testimony. Except for the one hereafter described, these motions were denied.[2]

On June 5, 1967, Respondent made a motion to dismiss the complaint herein, insofar as it alleges a refusal to bargain, on the ground that the Regional Director, by his order of May 31, 1967, vacating the Decision and Direction of Election in Case 17-RC-5126, had eliminated

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2. In connection with the denial of one of these motions, an exhibit theretofore marked for identification only was admitted into evidence for limited purposes.

from this record all proof of the appropriateness, for collective-bargaining purposes, of the unit set forth in the complaint. The motion to dismiss was denied but the parties were given leave to apply for a reopening of the record herein to receive further evidence on this issue. Respondent moved to reopen the record and the General Counsel moved to incorporate into the record the transcript of testimony and the exhibits in Case 17-RC-5126. The motion to reopen the record was granted and a hearing on the designated issue was held before me at Wichita, Kansas, on August 9 and 10, 1967, at which all parties were represented and afforded an opportunity to adduce further evidence on the designated issue, to cross-examine witnesses, and to argue on the facts and the law. The transcript of testimony and exhibits in the representation case were received in evidence as statements of the parties.

On August 10, the hearing was continued to permit the General Counsel to investigate the accuracy and completeness of documentary proof submitted by Respondent, and a date was set for the filing of briefs on the reopened issue. In view of this delay, and the fact that the record is complete on the allegations of interference with employees' rights and of discrimination against the six employees, it is my opinion that it would not serve the policies of the Act to withhold the issuance of a decision on these issues until the completion of all proceedings in connection with the allegations of refusal to bargain. Accordingly, in this Preliminary Decision I shall dispose of the indicated issues and I shall resolve the issues bearing on the refusal to bargain in a Supplemental Decision.[3]

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3. While this procedure is not in strict conformity with the Board's Rules and Regulations, it has not been disapproved where its use was justified by the circumstances and was not prejudicial

For the reasons hereinafter set forth in detail, I find that Respondent interfered with his employees' exercise of rights of self-organization and that his discharge of the six employees violated Section 8(a)(3) of the Act.

Upon the record in this proceeding,[4] limited to the issues set forth above, and the demeanor of the witnesses, I make the following:

Findings of Fact

I. The Employer

Respondent is engaged, as sole proprietor, in several businesses under various descriptive trade names, all of them connected with the oil and gas industry.[5] KRH, the enterprise involved in this proceeding, operates a plant at Otis, Kansas, where it extracts helium from natural gas by processes utilizing very low temperatures (cryogenics) and then markets the compressed helium and the other products separated in the extraction process. The answer admits that this enterprise annually sells helium

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to the rights of any of the parties. (See *Equitable Life Insurance Company*, 133 NLRB 1675; *Schimmel Hotel Company*, 147 NLRB 1378.)

4. Respondent's motion to correct typographical errors in the transcript was not opposed and is hereby granted. Additional typographical errors are corrected as follows: on page 33, line 19: "consumed" is changed to "assumed"; on page 44, line 23: "3-E" is changed to "3-D"; on page 47, line 5: "3-F through 3-R" is changed to "3-E through 3-R"; on page 81, line 21: "received" is changed to "sent"; on page 210, line 14: "4-Q" is changed to "3-Q"; on page 267, line 25: "No. 15" is changed to "No. 14"; on page 321, line 22: "elocution" is changed to "circumlocution"; on page 336, line 3: "respect laws" is changed to "expect lawyers."

5. Kansas Refined Helium Company, Red Tiger Drilling Company, Red Tiger Trucking Company, Red Tiger Caterpillar Company, Hayes Tank Service, Great Plains Drilling Company, Frontier Oil Company, and Comanche Supply Company.

valued at more than $50,000 to persons outside the State of Kansas and that it is an employer within the meaning of the Act. I so find.

II. The Labor Organization

Respondent admits, for the purpose of this proceeding, that the Union is a labor organization within the meaning of the Act.

III. The Unfair Labor Practices

A. *Chronology and Issues*

1. Background

In 1964, when Angle decided to embark upon the enterprise involved herein, he entered into contracts with the American Messer Corporation whereby that company undertook to construct the plant and turn it over to him in operating condition. The testimony is undisputed that it is a modern plant and almost completely automatic in operation. It occupies a substantial tract of land and consists of several buildings, storage tanks, and other structures, connected by pipelines and other necessary communication systems. The principal building contains offices and the main control room; other buildings shelter the compressors and other machinery.

The construction of the plant was completed about July 1, 1965, and, in accordance with its operating contract, American Messer began hiring the necessary personnel to man it for operation. Although Angle supplied the money for the payroll, all employees were hired, trained, and supervised by American Messer. After a delay caused by an accidental fire early in 1966, the plant began operating and was turned over to Angle in April of that year.

When the plant was turned over to Angle, its top supervisory staff consisted of the plant manager, "Buddy" Owens, the operations and engineering manager, Henry Tyler, and the chief of maintenance, John Stiff. The other plant personnel included "instrument men," who repaired and maintained the gauges and similar devices, some general maintenance employees, an electrician, a clerk, 4 "senior operators" and several "junior operators," totaling approximately 24 employees.

2. Chronology

a. *Demand for Recognition and Refusal*

About the middle of June 1966,[6] one of the KRH employees got in touch with the Wichita office of the Union and Hager Patton, a representative, was assigned to assist in the organizing effort. After making a preliminary survey and determining that there appeared to be sufficient interest, Patton and another union representative, C. L. Williams, held a meeting at Great Bend on June 22, at which four KRH employees were present and signed cards designating the Union as their collective-bargaining representative.

Additional employees thereafter signed cards and, on June 29, the Union wrote a letter to KRH at Otis, marked for the attention of Plant Manager Owens, stating that it represented "a majority of the Production and Maintenance employees" at the plant and offering to meet for the purpose of negotiating a collective-bargaining agreement.

On the following day, June 30, the Union mailed an election petition to the Board's Regional Office at Kansas City, together with the cards of "30% or more of the em-

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6. All dates hereafter, unless otherwise noted, are 1966.

ployees in such plant," a list of the card signers and a copy of the letter to KRH requesting recognition. A copy of the letter to the Board and a copy of the petition were mailed to KRH.

Angle testified that he received both letters at his office in Wichita, in the same mail, on June 30 or July 1. Under date of July 6, he wrote a letter to the Union acknowledging receipt of both letters, stating that he did not believe the Union represented a majority "in the proper bargaining unit" and that he would handle the matter through a Board-conducted election.

On July 11, Angle wrote a 13-page letter to each employee of KRH. In this letter he reproduced a copy of the three-page letter he had written each employee as he was hired the previous July, and a three-page roster and length of service record of each of the employees in each of his enterprises. Again on Juy 27, Angle wrote a letter to each of his KRH employees, this time stating that he had received word that the Board "will hold a hearing soon to determine who is to vote in the election." In addition to assuring each employee that in the election he could vote as he pleased, regardless of whether he had signed a "union card," Angle urged all employees to vote and made several other statements discussed below. On July 29, Angle again wrote a letter to all KRH employees, enclosing an unsigned note which he had received commenting on his treatment of the plant employees.

b. *The Representation Case*

The Board hearing on the Union's election petition[7] was held on August 9 at Wichita. Several questions were raised and explored: the principal one being whether the

7. Case 17-RC-5126.

senior operators were supervisors within the meaning of the Act. Respondent took the position that they were supervisors and, therefore, should not be included in the unit: the Union disagreed. The Regional Director's decision, issued August 25, found: (i) that the unit requested by the Union, limited to the production and maintenance employees of KRH, was an appropriate one; (ii) that two of the employees were students and should be excluded as temporary employees; and (iii) that the senior operators were supervisors and, therefore, excluded from the unit by the Act.

The Union requested the Board to review that portion of the Regional Director's decision which held that the senior operators were supervisors. On September 9, while the application for review was pending, the election was set for September 28. On September 20 the Board, by telegraphic order, amended the Regional Director's decision: it stated that the status of the senior operators could be best resolved by the challenge procedure and directed that they be permitted to vote subject to challenge. Review of the Regional Director's decision was otherwise denied.

On September 21, the Regional Office notified the parties that, by reason of the filing of the charges in this proceeding, the election would not be held as scheduled on September 28 but would be indefinitely postponed pending the disposition of the charges or a request by the Union to proceed with the election.

On May 31, 1967, pursuant to the Union's request for leave to withdraw its petition, the Regional Director issued an order approving the request and ordering that the Decision and Direction of Election be vacated; that the notice of hearing be withdrawn; and that the proceeding be closed. Respondent thereupon moved that the com-

plaint herein be dismissed with respect to the allegations of unlawful refusal to bargain, as set forth above, and the hearing was reopened on that issue.

c. *The Alleged Interference and Illegal Discharge*

On Monday morning, June 27, at his Wichita office, Angle received a two-page, typed, unsigned letter addressed to him and severely criticizing the operation of the KRH plant by the plant manager. The envelope shows that it was mailed from Otis during the forenoon of the previous Saturday, June 25. Other than calling Plant Manager Owens to Wichita and conferring with him, Angle did nothing about this letter.

As stated above, the Union's request for recognition was received by Respondent on June 30 or July 1, and his refusal followed on July 6. Also as stated, Angle sent letters to all his KRH employees under dates of July 11 and July 27. In the letter of July 27, Angle stated that he had "just . . . raised wages in all other divisions of the Company" but that he had been informed that unfair labor practice charges could be filed against him if, prior to the election, he either gave or promised wage increases to KRH employees. The Union promptly wrote a letter to Angle stating that it would not file charges based upon his grant of similar wage increases to KRH employees, then or at any time prior to the election, if "granted on an equitable and nondiscriminatory manner," and that it was sending a copy of its letter to the Board.

On July 28, Angle invited all of his KRH employees who were not on duty to a dinner at Great Bend and, after dinner, he made a speech. The following day he received a second anonymous letter, criticizing his speech at the dinner. Angle sent copies of this letter, with one of his own, to all employees and he had both letters posted

on the bulletin board at the plant. Shortly thereafter, the Union sent an answering letter to all employees on this subject.

Shortly after the Board hearing on August 9, Angle had a long telephone conversation with Russell Sims, one of the senior operators, on the so-called dissension in the plant. On August 17, according to Russell L. Bishop, one of the junior operators, Angle came to the plant and made several statements to him about the union and those involved in union activities. Bishop also testified that on a date near the end of that month, Norman Klein, comptroller for all of Angle's enterprises and general manager of the KRH plant, had a conversation with him at which conditions at the plant were discussed.

Shortly after the issuance of the Regional Director's decision on August 25, the Union wrote a letter to all of its KRH employee members, stating that an appeal would be taken to the Board from that part of the Regional Director's decision which held the senior operators to be supervisors and that this procedure might delay the holding of the election for a short time.

At the end of August, Angle received a third anonymous letter, mailed from Great Bend on the 29th, again criticizing the supervisory administration at the plant and accusing nine named employees of a willingness to do "anything" to curry favor.

Between September 13 and 16 - - - Tuesday to Friday - - - and on Monday, September 19, Angle interviewed every employee at the plant. He told each one that, since practically all the hiring had been done by American Messer Corporation and, therefore, he had never had the opportunity to speak with the plant employees, he would treat these interviews as if they were "pre-hire" inter-

views. The interviews ran from half an hour to more than 2 hours, and Angle admittedly asked many questions concerning the employees' relationship to and activities on behalf of the Union.

On September 20, six employees: Dwayne Johnston, an instrument man; Russell M. Sims and Arel L. Rodgers, senior operators; and Thomas B. Garrett, Russell L. Bishop, and John S. Harris, junior operators, were called to the office. When they arrived there, they found Angle: he said he didn't like "long goodbyes" and gave them identical letters of discharge.

On the following day, Respondent announced wage increases to all the remaining employees, effective September 26.

3. The issues

One of the principal issues in this case, prerequisite to the determination of several other issues, is the status - - - supervisory or nonsupervisory - - - of the senior operators.

Other issues raised by the complaint and answer, and to be decided at this time, are whether Respondent unlawfully interfered with his employees' rights of self-organization and whether his discharge of the six employees constituted discrimination to discourage their membership in the Union.

In addition to these issues, the General Counsel, stating that Angle, by the discharges and other conduct, has not only flagrantly violated the Act but that he has also declared his purpose to continue to violate it, has requested that an unusual remedy be applied herein: that Respondent be required not only to make whole the discharged employees by paying them the amounts they would have earned but for their discharge, but that such payments be

computed without the customary diminution for interim earnings.

Respondent, although contending that the discharges did not violate the Act, argues that, even if they should be held to constitute an unfair labor practice, nevertheless Sims and Johnston, by their improper conduct while still employed, and Garrett, by failing to testify in this proceeding, have made themselves unsuitable for further employment by Respondent and that their reinstatement should not be ordered.

B. *Discussion and Findings*

1. The status of the senior operators

Respondent has taken the position, at least since the hearing in the representation case, that the four senior operators are supervisors and, therefore, excluded by the Act from the unit of production and maintenance employees set forth by the Union in its petition and by the General Counsel in the complaint. The Union's contention has been that the senior operators are "workmen," like the others in the plant, and it urged the Board so to hold in its request for review of the Regional Director's decision that they were supervisors. By his issuance of the complaint herein, the General Counsel takes the same position as the Union on this point.[8]

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8. When this proceeding was originally heard, the related representation proceeding was still pending. Although the Board's telegraphic order of September 20 therein directed that the status of the senior operators be determined through the "challenged ballot" procedure, the Regional Director's indefinite postponement of the election upon the filing of the first charge herein made it obvious that the indicated procedure could not be utilized. Accordingly, the parties herein were permitted to litigate this issue fully in this proceeding. The subsequent order, therefore, of the Regional Director, although it nullified the representation proceeding and each of its constituent parts, had no effect upon the record on this issue herein.

Section 2(11) of the Act defines the term "supervisor" as:

> . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The area of inquiry on this subject, in the light of the criteria set forth in the statute, is somewhat contracted by Respondent's frank statement, in his brief, that:

> No contention is made that the senior operators did actually suspend, lay-off, recall, promote, transfer or discharge. . . .

other employees, but that:

> The question is whether or not the senior operators had the authority to adjust grievances, to assign, responsibly direct or effectively recommend, reward or transfer their subordinates.

It is, moreover, quite clear and undisputed that the resolution of this issue will be determined solely on the basis of the relationship of the senior operators to the junior operators.

Functions: The record shows that Respondent's plant, newly built by American Messer, a company specializing in the construction of gas refineries, is as completely automatic as present technical knowledge can make it. It appears that the functions performed by "operating" employees - - - senior and junior operators - - - are normally restricted to (i) observing gauges and other indicators

to make certain that the process is following its assigned course; (ii) adjusting controls to compensate for deviations from that course; (iii) taking necessary steps to keep the machinery functioning; (iv) switching the course of the process from one system to another or substituting elements within the system, and (v) performing, as needed, certain duties peripheral to the process itself, such as filling the containers or tank trucks in which the compressed gas is to be transported.

All of the operators were chosen, and trained on the job, by American Messer; they were all given the same general course of instruction and then assigned to specific jobs as junior or senior operators. At least two of those designated as senior operators, Sims and Rodgers, had prior relevant experience with National Helium Company.

Each shift consists of one senior operator and two or three junior operators. The post of duty of the senior operator is at a large bank of indicators, called "the board," in the main control room in the principal building; the junior operators move about the plant area to cover the machines and controls in the outbuildings and on the pipelines between the various tanks and buildings. It was not unusual, however, for a junior operator to take the senior's place at the board for short intervals during a shift. One junior operator, Pittman, filled a senior's position for several weeks during vacation period and was subsequently promoted to senior operator. Two of the junior operators during the period involved herein were also promoted to senior operator positions when the two senior operators were discharged on September 20. In addition to taking previously prescribed actions when gauges and other indicators showed the need therefor, the operators had standing instructions, through a manual called the "blue book" to perform certain duties with respect to particular machines at

some time on every shift. Additional instructions, involving the performance of tasks made necessary by unusual circumstances, were set down, by concededly supervisory personnel only,[9] in a book called the "special orders book" which was consulted, by senior and junior operators alike, at the commencement of each shift and in which both seniors and juniors might find assignments to be performed by them during their tour of duty. At the end of the shift the senior operator usually took another look at this book to make certain that all assignments had been completed. If his inspection of the book and, possibly, of the mechanism, disclosed that an assignment to be performed by a junior operator had not been carried out, he would call that oversight to the attention of the operator who should have performed it.

The "special orders book" also contained directions concerning the preparation of containers for gas to be sold and the loading of trucks of, or for, purchasers. In this aspect of the work, also, the senior and junior operators knew the functions they were expected to perform and it was only where a prescribed duty was neglected by a junior operator that the senior operator was required to call his attention to it.

Supervision: The three shifts at the plant are: midnight to 8 a.m.; 8 a.m. to 4 p.m.; and 4 p.m. to midnight. During the regular daytime hours; i.e., 8 a.m. to 4 p.m., Monday through Friday, the plant contains both the operating crew on that shift and the other plant employees: supervisory, maintenance, and clerical. From 4 p.m. each day until 8 the next morning, and during the entire weekend, the operating crew on those shifts are normally the only employees at the plant. Respondent contends that,

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9. W. E. Owens, Plant Manager; Henry Tyler, Plant Engineer; and John Stiff, Maintenance Manager.

because at these times - - - 120 to 140 hours per week as against the 40 to 60 hours when other employees were present - - - "the physical control of the entire plant was in the hands of the senior operators," they must be considered supervisors.

The record shows, however, that Plant Manager Owens, Plant Engineer Tyler, and Maintenance Manager Stiff all reside in the vicinity; that if any unusual problem arises during the night or weekend the senior operator informs Tyler, who gives the necessary direction, sends down a maintenance man, or comes to the plant himself. The testimony shows that it was not unusual for Tyler or Owens to spend many hours at the plant during the nights and weekends, either because they elected to do so or because of the existence of operating problems or outside emergencies, such as storms. Moreover, the "special orders book" often carried information about problems believed imminent, together with either instructions for meeting them or listing the persons to be called upon for assistance. In the light of these factors, therefore, I do not consider the physical absence from the plant of supervisory personnel during nights and weekends to be dispositive of this issue.[10]

Discipline: Plant Engineer Tyler conceded that the senior operators had no authority to discipline junior operators. The definite formulation of this policy grew out of an incident, during the spring of 1966, involving Sims and a junior operator named Stahlman. The junior operator had refused to perform a task falling within the regular scope of the duties of a junior operator[11] and Sims reported the

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10. Compare: Colo. *Well Service, Inc.*, 163 NLRB No. 101.

11. Sims, testifying on 2 separate days, gave two versions of the dispute with Stahlman. The first was that the junior operators on his shift fell into disagreement as to which of them

matter to Tyler. After giving the matter some thought and consulting officials at both American Messer and Air Reduction Company, Tyler informed the senior operators that they had no disciplinary powers over the juniors and that, if a situation should arise involving the possible need for disciplinary action, they were to call him and he would take the necessary action. Tyler subsequently discharged Stahlman.[12]

Recommendation of wage increases: Respondent contends that the senior operators had authority to "effectively recommend, reward . . . their subordinates." Tyler conceded that no senior operator had ever "rewarded" an employee but the record shows that, sometime in April, Sims heard a rumor that some of the employees would

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should take certain water samples; that he tried to solve the problem by suggesting that they perform the task in turn but that Stahlman refused. The following day, Sims testified that one of the plant supervisors had instructed him to have Stahlman clean some water out of a tank and that Stahlman refused. I find that this conflict is unimportant, since neither version contains probative evidence that even at that time Sims was exercising responsible direction of the junior operator's work, and I do not resolve it.

12. Tyler testified that he had told Stahlman, after Sims had complained about him, that he was "working for" Sims and would do as Sims directed or not work there. He also testified that, when he told the senior operators that they would not be given authority to discharge junior operators, he also told them that in such situations he would back them "to the full extent." There is no evidence that a similar situation ever arose. I find that Tyler's statement to Stahlman, in context, did not evidence a grant of supervisory authority to the senior operators and that his statement to the senior operators imported no more than a promise to investigate, since he was careful to say he would "come out immediately," and that the senior operator's recommendation would be given considerable weight. Accordingly, I do not find that the senior operators were given authority "effectively to recommend" discharge of other employees.

soon be given wage increases; that he went to Tyler and told him that, in his opinion, junior operators Garrett and Wakulich, who were on his shift, and Harris, who was not, were qualified employees who had performed well and deserved raises. Tyler said he would think it over. About a month later, Tyler told Sims that he was about to inform those three juniors that they were to receive increases and asked Sims if he wanted to come with him. Sims said he did and, after Tyler told each of the men about the raise, Sims congratulated him.[13]

Respondent's records show that, of the 21 employees in the plant during May, the 3 mentioned by Sims received wage increases on May 9 and 10, others received increases on May 23. Of the eight who did not receive increases, four had commenced their employment in April or May. Respondent testified that, in interviews with employees, he pointed out to them that in the first 10 months of the plant's operation, they had been given two wage increases.

On the basis of the foregoing evidence, I find that, despite the slight time difference between the grant of increases to the three junior operators mentioned by Sims and the others in the plant, Sims' recommendation made no meaningful contribution to these wage increases but that they were part of the general pay raise. I also find that the senior operators did not have authority to make effective recommendations for wage increases.

Pay differential: Respondent, pointing out that the senior operators were paid between 80 and 85 cents per

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13. There were three other senior operators in the plant. Ham testified that he never did anything about wage increases for the junior operators; Rodgers was not questioned on the subject; and Harms did not testify.

hour more than the junior operators,[14] asserts that this must be due to either of two factors: (i) that the senior operators were highly skilled craftsmen and, therefore, able to command high wages, or (ii) that they were being compensated for the authority and responsibility inherent in their positions. Since the training of the senior and junior operators was the same, Respondent argues, the wage differential must be due to the supervisory authority inherent in these positions.

This argument is a melange of fallacies and omissions: as of the time when Respondent makes its comparison, all four senior operators had been at the plant since July 26, 1965, when American Messer first hired operating personnel. Of the 10 junior operators in Respondent's employ in June, however, only 3 - - - Pickerill, Wakulich, and Harris - - - had been there since the beginning and Pickerill's wage rate of $3.30 represented a gap of only 45 cents below that of senior operator Rodgers. Moreover, Pickerill was one of the two junior operators who became senior operators when the six employees, including Harris, were discharged on September 20 and Wakulich became a senior operator in December. As Respondent has so carefully pointed out, the plant probably represented, when completed, the furthest technical advance in construction and design for its purpose in the country and it was, if only momentarily, unique. It is, therefore, at least as reasonable to argue that it was the experience which they had acquired in the operation of this outstanding installation which made the senior operators, whose duties involved its nerve-center, sufficiently valuable to Respondent and attractive to others in the industry to justify Respondent's higher wage rates in

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14. My independent analysis of the wages paid these employees during the month of June, shows that (with a single exception) this is a fair and conservative characterization of the differential.

an effort to keep them in his employ. The statement that the wage differential necessarily indicates that there was responsibility and supervisory authority in these positions is an *ipse dixit* which must be, and hereby is, rejected.

Timecard approval: On February 5, a notice was posted on the control room bulletin board stating:

> Beginning next work week . . . February 7, 1966 . . . each Supervisor will approve employees time cards. . . . Senior Operators will approve employees under their supervision. . . .

Sims testified that thereafter, on the timecard of each junior operator on his shift, he placed his initials on the line labeled "Approval of time" and then gave the cards to Tyler who, after also initialing them, turned them over to the office for payroll purposes. Tyler admitted that the cards were not valid until he had signed them. While the reference to employees under the "supervision" of the senior operators is purely conclusionary, the notice also appears to draw a distinction between the senior operators and "supervisors," since it refers separately to each. In any event, this function of timecard approval, without more, does not necessarily convert the senior operators into supervisors.[15]

Respondent's characterization: The terms in which an employer refers to a specific position are not, in themselves, determinative of the supervisory status of an employee under the Act, since an employer is free - - - for his own purposes and by the use of his own criteria - - - to use any terms or titles he may prefer. Accordingly, Respondent's references to the senior operators as "supervisors," or in other terms indicating authority, in the seven

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15. *United States Gypsum Co.*, 118 NLRB 20, 26; compare: *Western Saw Manufacturers, Inc.*, 155 NLRB 1323, 1329, footnote 11.

notices posted between October 1965 and April 1966, are not conclusive for the purpose of this proceeding under the Act. As representations by the employer to the other employees, however, they are entitled to be given consideration, together with other factual evidence, in reaching a decision on this point.

The notices dated October 4, 1965, and January 5 do not relate to the ordinary operation of the plant but to its "start-up" period, and they show that both authority and responsibility are reserved to American Messer personnel. In both notices, moreover, the terms "supervise," "responsible," and variations thereof, as applied to the senior operators, are purely conclusionary and there is no factual recital of any of the functions of these employees.[16]

The descriptive statement, in the notice dated February 2, concerning Ham's promotion to senior operator, that he was "to run the fourth shift," and the reference to certain forms as "Supervisor's Investigation Reports" are both purely conclusionary and carry little weight, even as representations to the other employees.

Unlike the others, the notice of February 5 has a direct bearing on the question under consideration, since it not only directs the performance of a specific function by the senior operators, but the evidence shows that, in accordance with its directions, the senior operators did initial the

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16. The additional statement in the notice of January 5 that "In the near future he [the senior operator] will have the full responsibility of plant operation during his shift" is not only conclusionary but, in its reference to responsibility in the *future*, casts doubt on its existence at the time of the notice. The meaning of the notice is further confused by the fact that there is nothing in the record to justify an assumption that responsibility "for the shift" and responsibility for "plant operation" during the normal functioning of the plant, is the same as it was during the "start-up" period.

timecards of the junior operators. To the extent that this function constitutes probative evidence, however, it has been already discussed and the use of the conclusionary phrase "under their supervision" in the notice adds nothing to its weight.

The notice dated April 25, which Respondent characterizes as a grant of authority to the senior operators to "call out" instrument men, simply lists the telephone numbers where two of them may be reached when no instrument man is on duty at the plant. I do not construe this information as a grant of authority to the senior operators over the instrument men.

The March 6 notice, posted when the plant was about to resume operation after the accidental fire which had shut it down, prescribes several safety rules and measures in addition to those normal for plant operation and directs the senior operators to "see that his employees take care of this." The functions of the junior and senior operators were fixed by the operating instructions in the "blue book" and in the procedures devised by American Messer. The prescription of additional precautionary measures in this notice merely adds to the fixed duties of both the senior and junior operators. The duty of the senior operators to see that the junior operators on their shifts perform their assigned duties extends, to the same degree, to these additional safety precautions. It is to be noted, moreover, that the function of making the single "super" safety decision, that of switching "flare-gas" into the transmission lines, is reserved for Tyler or Owens.

Despite Respondent's liberal use of the terms under discussion, the senior operators themselves do not appear to have been under the impression that they were supervisors - - - even within their personal definitions of the term. Sims testified that he had never been told, until

after the Board's representation case hearing, that he was a supervisor. Moreover, although he had a long telephone conversation with Angle a day or so after the hearing, Angle said nothing to him about his position being one carrying supervisory powers.[17] Ham, who testified for Respondent, also stated that he had never been told, prior to the representation case hearing, that he was a supervisor. Rodgers, who testified at the representation hearing on the duties of the operators, obviously was under the same impression, since Plant Engineer Tyler argued vigorously with him, the day after the hearing, about his testimony and criticized him for "denying responsibilities" which, Tyler insisted, he had.[18] This argument occurred, of course, after the status of the senior operators was recognized by Respondent as of great importance in the union campaign. Harms, as stated, did not testify.

Finally, despite the use of these terms in the notices, there is a serious question whether Respondent, himself, regarded the senior operators as part of management. His letter dated July 27, which urged every employee to vote in the Board election, was sent to all of his KRH employees, including the senior operators. Sims testified that Angle, in his telephone conversation only a day or two after the representation hearing on August 9, stated that there would be 21 employees eligible to vote in the election, and Angle did not contradict Sims' testimony on this point. The stipulated list of production and maintenance employees as of July 1 consisted, as stated above, of 22 names *including* those of the senior operators. One man on this list, William Sloan, an instrument man, had been

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17. Angle admitted having had the telephone conversation with Sims and did not contradict this testimony.

18. The distribution of the green "hard hats" to the senior operators shortly after the Board hearing has been disregarded as self-serving and without probative value.

terminated on July 24, and no replacement for him appears on the list of employees as of August 9.[19] Accordingly, Angle's reference to 21 employees eligible to vote is a substantially accurate statement based upon the inclusion of the senior operators.

Conclusions: The determination of whether specific employees are supervisors within the meaning of the Act is in each case a question of fact, to be decided by application of the statutory criteria to all of the relevant evidence.[20] Moreover, where the facts concerning supervisory status are in dispute, as they are here, I regard evidence of supervisory powers exercised - - - or not exercised - - - as far more persuasive than self-serving testimony concerning their mere conferral.[21]

The outstanding characteristic of the operation of this plant is that each operator in it, senior and junior alike, had and performed specific, preassigned tasks to keep it running. Practically all of the so-called directions by senior operators to juniors consisted of (i) calling the junior's attention to functions he was required to perform and which he had neglected to perform by reason of over-

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19. Respondent's record of KRH employees shows that R. L. Mootz started July 16 at $2.00 per hour. Since Slcan's wage rate had been $4.14 per hour during his entire employment which began September 4, 1965, it is unlikely that Mootz was his replacement.

20. "It is a question of fact in every case as to whether the individual is merely a superior workman or lead man who exercises the control of a skilled worker over less capable employees, or is a supervisor who shares the power of management." (*N.L.R.B.* v. *Southern Bleachery & Print Works*, 257 F.2d 235, 239 (C.A. 4; 1958) enfg. 118 NLRB 299, and 115 NLRB 787. See also: *Trailmobile Div.* v. *N.L.R.B.*, (C.A. 5; June 21, 1967).

21. *Purity Food Stores, Inc.*, 150 NLRB 1523, enfd. on this point, 354 F.2d 926 (C.A. 1; 1965); *Filler Products, Inc.* v. *N.L.R.B.*, 376 F.2d 369 (C.A. 4; 1967), enfg. 159 NLRB No. 113.

sight or inability to see the indicator calling for its performance, (ii) on the basis of greater experience, advising the junior how to perform one of his assigned tasks, or (iii) cooperating with the junior in the performance of a task that required joint performance.

Directions concerning nonroutine operations, even the periodic loading of trucks, were given by the undisputed supervisors through the "special orders book" and here also the senior and junior operators, as they read these directions, knew on the basis of their assigned duties to which of them each instruction was addressed.

On the basis of all the relevant evidence, and weighing it as set forth above, I find and conclude that the senior operators are, at most, leadmen and that they are not supervisors within the meaning of the Act.[22]

2. The Refusal to Bargain

In view of the reopening of the record herein on the issues raised by the pleadings with respect to the allegations of refusal to bargain; *viz.* the appropriateness of the unit set forth in the complaint and the Union's claim of status as the designated representative of the employees in that unit, decision of those issues must be reserved for the Supplemental Decision which will be issued when the record on them has been completed.

3. Interference, restraint, and coercion

a. *The incidents in issue*

The complaint, as amended November 23, alleges that Respondent, directly or through his agents, interfered with, restrained, and coerced his employees in the exercise of

22. See: *Dewey Portland Cement Company, Inc.*, 137 NLRB 944, 949; *United States Gypsum Company*, 116 NLRB 656, 659-660.

their rights of self-organization, and thereby violated Section 8(a)(1) of the Act, by the following conduct;

(i) July 1: by Tyler's interrogation of employees;

(ii) July 5: by Angle's threat to close the plant;

(iii) July 15: by Tyler's threat to withhold benefits;

(iv) July 28 (amended at the hearing from July 5): by Angle's threats of discharge;

(v) August 11: by Klein's grant of wage increases and promise of fringe benefits;

(vi) August 27: by Klein's threat of discharge;

(vii) September 13 to 16, by Angle's - - -

(a) interrogation concerning union activities,

(b) threats of discharge,

(c) interrogation concerning their voting intentions, and

(d) threats to block the election;

(viii) September 16: by Owen's threat to block election;

(ix) September 21: by Angle's grant of wage increases.

The General Counsel's brief, however, after devoting one section to a discussion of the wage increases of September 21 (item ix, above), lists nine additional incidents claimed to constitute "threats and interrogation," contending that in each of them Respondent violated Section 8(a)(1) of the Act. The list of nine incidents, however, includes six which occurred during the series of interviews conducted by Angle between September 13 and 16 (item vii, above). The remaining three on the General Coun-

sel's list are: (1) an August 17 conversation between Angle and employee Bishop; (2) a September 20 conversation between Angle and Sims following the discharge of Sims and five other employees; and (3) the July 28 speech by Angle (item iv, above).

The August 17 incident on the General Counsel's list is not alleged in the complaint as one of the violations of Section 8(a)(1) of the Act[23] and, therefore, no consideration can be given to it for that purpose.[24] Similarly, the complaint's allegations of interference, restraint, and coercion do not set forth anything like the statements made by Angle in his conversation with Sims on September 20, and, therefore, no finding of violation can be made on them. However, the statements of Angle on this occasion have been considered in determining his motive for his discharge of Sims and the other employees.

Checked against the other incidents of interference, restraint, and coercion alleged in the complaint, the General Counsel's brief makes no mention of those numbered, on the list above, (i), (ii), (iii), (v), and (viii). More importantly, the record contains no evidence in their support. Accordingly, the allegations concerning them should be dismissed.

The August 27 incident in which, the complaint alleges, a threat of discharge was made by General Manager Klein (item vi, above), is not on the list in the General Counsel's brief, but the record does contain evidence re-

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23. There is nothing similar alleged at the approximate time and, therefore, the General Counsel's routine motion "to conform the pleadings to the proof" on minor variances cannot help him here.

24. Consideration will be given to this incident in determining the existence of the "good-faith doubt" claimed by Respondent as his justification for refusing to bargain with the Union.

lating to it. Despite the General Counsel's failure to refer to it, there is nothing to justify a conclusion that the issue has been abandoned and, therefore, consideration will be given to the evidence.

b. *The July 28 Speech*

The July 28 statements of Angle, allegedly violative of Section 8(a)(1) of the Act, occurred at a steak dinner which he gave at a local motel. Present were practically all of the KRH employees not then on duty, some of Angle's oil field workers, and several members of his family. Angle admittedly made a speech. According to Dwayne Johnson, the only employee - - - and the only person other than Angle - - - who testified on this matter, Angle was angry: he said he had been through two wars and that he would "get" anyone who crossed him; that he had a violent temper and a passion for revenge. Angle then said, Johnson testified,

> that his relation with his oil field employees had always been a matter of root-hog-root[25] and that they had always been that way or he would shut the plant down or sell it or give it to L.B.J.

Whether Angle used this expression accurately, as noted, or in some other sense, there is no doubt - - - and

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25. The aphorism, correctly phrased, is "root, hog, or die." It is defined, by authorities on usage, as follows:

> An expression, usually of imperative force, indicating the necessity of either working hard or suffering undesirable consequences. [*Dictionary of American English* (1944)]
>
> With either a complete, overwhelming success as a result of hard work or a total failure; complete acceptance, cooperation, work, and sympathy or total rejection. [Wentworth & Flexner: *Dictionary of American Slang* (1960)]

From the context of Angle's speech, as described by Johnson, and his attitude, as expressed in his letters of July 11 and September 19, it appears that Angle used the aphorism with admirable precision.

I find - - - that he said, in effect, that if he could not continue to treat his KRH employees as he had always treated his oil field employees (none of whom are organized), he would close the plant. The record, particularly Angle's letter to his KRH employees dated July 27 and his admission that about the end of July he had been reliably informed that practically all of them had signed union cards, makes it quite clear that he was referring to the change in relationship that would necessarily follow from their designation of the Union as their collective-bargaining representative. His statement, therefore, that he would not change his relationship with his employees and that, if compelled to do so, would shut down or sell the plant, cannot be interpreted as anything less than a threat in restraint of his employees' rights of self-organization.[26] Accordingly, I find that Respondent, by this threat to close the plant if the employees should designate the Union as their representative, violated Section 8(a)(1) of the Act.

c. *The August 27 Threat*

Russell Bishop also testified that on August 27, he met Norman E. Klein, Respondent's comptroller for all of his

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26. Angle testified that "there was no speech": that at the conclusion of the dinner one of the KRH employees made a brief "thank you" statement and that he answered by noting that it was the first time that he and his family had been able to get together with the KRH employees. He also testified, however, that he referred to his letter of July 11 to all KRH employees and assured them it was "all one company . . . [they] all worked for each other." It is to be noted that the opening words of this letter are as follows:

> The past several days, I have just become aware of the misunderstanding, conflict and the resulting dissatisfaction with my employees at the Kansas Refined Helium Company plant.

This admission makes Angle's testimony incredible: I reject it and credit Johnson's account of the incident.

enterprises and general manager of the KRH plant, at a pool hall in Otis. They talked for a while and then began discussing the Union: Klein said that Angle had told him that he didn't care what the Union said or did; he was going to hire and fire whom he pleased and "was going to get rid of all the union agitators or organizers." Klein denied having been in Otis on the 27th - - - although he admitted having been there on both the 18th and 31st: he also admitted that he visited the pool hall every time he came to Otis and that he had met Bishop there but he denied having had a conversation with him in which he discussed the firing of any employees. Klein, however, admitted that about this time he was asking "some of the employees" why they were discontented with conditions in the plant and that that was one of his reasons for his visit on the 31st, but he "didn't believe" he had asked Bishop because he didn't know Bishop very well. Klein also admitted that, before going out to the plant at that time, he and Angle had discussed the discontent of the employees but did not think Angle had "specifically" directed him to find out about it.

Bishop appeared to be a credible witness and his testimony concerning this encounter is consistent with other credible testimony concerning Respondent's activities. Whether it occurred on the 27th, as he testified, or on the 31st, when Klein admitted he was at the pool hall, is not important. Klein, on the contrary, was evasive: after conceding practically all of the elements of the conversation to which Bishop testified, he merely denied that he had discussed anything concerning the firing of employees. I credit Bishop's testimony, reject that of Klein and find that Klein's statement that Angle would "get rid of all the union agitators and organizers" was a threat to discharge employees for exercising their right

of self-organization which violated Section 8(a)(1) of the Act.

d. *The Interviews*

The series of interviews conducted by Angle with each of his employees at the KRH plant is the most comprehensive and revealing of his efforts to forestall the employees' efforts at self-organization. He conducted these interviews continuously from Tuesday, September 13 until Friday, the 16th and he completed them on Monday, the 19th. They ran, he testified, from 8 a.m. until 3 a.m., so that he could see the employees on all three shifts, and the interviews ranged from half an hour to 3-1/2 hours in length.

Angle testified that he followed the same pattern in every interview, first pointing out to the employee that he, Angle, had not previously interviewed the employee but that he was doing so now because he felt that the situation was "desperate." Angle also warned each employee that he would be asked many questions, to some of which he, Angle, knew the answers and to some he did not: that he wanted the employee to feel free to speak his mind and thus to preserve his self-respect. Angle then asked each employee why he felt there was "dissension" in the plant, and showed each of them the first of the three anonymous letters, asking him to read it. While the employee was reading the letter, Angle testified, he watched the employee closely to observe his reactions or for any indication that he had previously seen it. He then showed each of them the second letter - - - which Angle himself had circulated and posted, with his own covering letter, when it was first received - - - and then followed with the third letter. Angle then discussed the letters with each employee, asking him whether he did not think the writer "must have an unbalanced mind, was mentally sick." Angle also told each of them that he had compared, with

the aid of a microscope, the first and second letters with a letter written on the KRH office typewriter and had decided that they had been written there: that, because of the large number of people in the plant during the day, these letters must have been written during the night or early morning shifts when only three people were there and that more than one person must have known about them.

After discussing the "dissension" and the anonymous letters with each employee, Angle testified, he asked each of them - - - except Rodgers, who testified at the Board hearing - - - whether he had signed a union card. Those who said they had were asked why they had done so. Each employee was also asked by Angle for the names of those who had been talking about the Union and each was asked where he had obtained the union card which he had signed. Angle testified that he told each employee that he had to find "this group of malcontents, the agitators that were . . . causing this tremendous dissension . . . and get them out the gate and never to return. . . ."

The six employees who testified concerning the interview - - - Bishop, Harris, Sims, Rodgers, Johnson, and Wakulich - - - confirmed Angle's testimony concerning the format of the interviews and they supplied additional details.

Russell Bishop testified that Angle opened the conversation by telling him to forget they knew each other and to act as if Bishop had just come in looking for a job. Angle then showed him the third anonymous letter which, in obnoxious language, referred to nine KRH employees, including Bishop, as toadies and sycophants, and Angle angrily asked him whether he had written it or knew who had written it. Bishop denied any knowledge of the letter. Angle then stated that the inclusion of Bishop's

name did not absolve him because anyone who wrote an accusatory letter of this type might include his own name on the list in an attempt to divert suspicion and, having made this statement, Angle again asked Bishop whether he wrote the letter. Again Bishop denied it but agreed with Angle that the writer was probably "unbalanced." Angle then showed Bishop the second of the letters, which had been posted and circulated, and asked Bishop whether he had written that one and Bishop said he had not.

Their talk then turned, according to Bishop, to unions and Angle asked him whether he was "happy" at the plant. When Bishop said he was not, and that he wanted a retirement plan, Angle told him that he could go to "a million and one other jobs that were union" and that there he could get the benefits the KRH employees were asking of him: that he had no retirement plan for himself, so why should a young man like Bishop have one? Angle also said that anyone who wasn't "a hundred percent" for him had no need to be there; that he didn't want anyone there who was not "a hundred percent happy" and that he would get rid of anyone who was not. Angle then asked Bishop how he would vote in the election. When Bishop answered that the ballot was a secret one and that one of the foundations of this nation's democracy was the secret ballot, Angle said something like "democracy hell; if it weren't for me, you would be out the gate." Angle then said that he was going to get rid of all the "malcontents," of all those who were not "a hundred percent" for him, and that Bishop would be one of the first to go. At this Bishop asked Angle if he was through because, if he was, he would "walk down the road." Angle detained him for a few minutes more but Bishop said there was no need of further talk, since Angle had already made up his mind.

This testimony of Bishop was credibly given, it was not denied by Angle and I accept it as an accurate account of the interview.

John Harris testified that his interview with Angle lasted for an hour; Angle told him to conduct himself as if he were applying for a job because he was going to make some changes and wanted some information; and there were some people in the plant who were "causing trouble" and that management was upset. Angle pointed out that they were pleased that Harris had been doing a good job: he then flatly asked Harris whether he had signed a union card and, when Harris said he had, asked him why he had done so. Harris said that he considered that the plant management was "pretty messed up"; he wanted to know what the plant policies were, particularly with respect to insurance; the rule on sick leave was simply that Angle would determine what was "normal" and there would be no specific amount stated; and he felt that, for the Company's policies to be acceptable, they would have to be in writing. Angle answered, according to Harris, that he was not going to put anything in writing; that if Harris wanted written policies he could go to a "union place" or back to Beechcraft, where he had come from. Angle said, angrily, that he did not have to make written policies and that he would not; there were "malcontents" in the plant; and he would find out who they were and get rid of them. Angle then asked Harris if he intended to vote for the Union; Harris said he did and Angle turned the talk to other subjects, such as Harris' education and plans for the future. After a period of discussion on these subjects, Angle again asked Harris if he still intended to vote for the Union; Harris said he thought he would have to and Angle expressed bewilderment. Angle said, according to Harris, that any employee who was for the Union would not be happy with his, Angle's, operation of the plant and was,

therefore, a "malcontent." Angle asked him what was wrong with the operation of the plant and how it could be remedied: Harris testified that he told Angle that there was confused and excessive supervision.

Angle did not dispute any of Harris' testimony outlined above; Harris was a credible witness and his testimony is accepted.

Russell Sims testified that his interview with Angle lasted over an hour and a half: that Angle, in addition to saying that it was in the nature of a prehire interview, stated that Sims was to explain his qualifications for the job he held and that his future employment and wages would be dependent on his statement; Angle, after going over his own life history and accomplishments, said that he had his "life's work" in the KRH plant; he could not afford to "mess around" with the trouble at the plant; and the interviews were for the purpose of determining which employees he would eliminate and which he would keep.

According to Sims, Angle stated that Sims had signed a union card and that he was one of the "big union agitators," as were all the senior operators. Angle accused Sims of bringing in Harris and Rodgers, who were both "big union men" from Victor's Refinery, but Sims insisted that Rodgers had always been antiunion. After asking Sims whether he hadn't passed out union cards, Angle said he was not going to have a union in the plant; that he couldn't permit the Union, the National Labor Relations Board, or Sims to stand in his way, but that he would run the plant to suit himself.

Angle continued, Sims testified, by saying that he would find out who had signed union cards and would fire every one of them; he would fire anyone who was not "gung-ho" for Angle; and by the time he got through firing people there would not be anybody left to vote for the Union.

During the interview, Sims testified, Angle was angry; he shouted and banged his fist against the wall; he referred to himself as a "tiger" and said if "you pull a tiger by the tail, he is going to turn and claw you to bits and you have got one by the tail."

Angle testified at some length concerning his interview with Sims but he emphasized his inquiries concerning the anonymous letters. He also testified that Sims expressed a strong desire for a written statement of employee policies and assigned the lack of such statement as a major cause of the dissatisfaction and "dissension" in the plant. Angle outlined the benefits accorded the KRH employees and said he did not understand what they were dissatisfied about and he noted that Sims had said that it was mainly because the terms were not in writing.

Most of Sims' testimony concerning his interview with Angle merely added details to the testimony of the other witnesses and of Angle himself. Sims' account of Angle's statements to him, however, more specifically connected the talk of "dissension" and "dissatisfaction" with union activity. But Angle's own testimony concerning the interview with Sims went further than it did with the others and he testified that, by the end of his talk with Sims, he came to the conclusion that Sims had written at least the first of the anonymous letters. It is important to note that this letter, in the paragraph preceding the last puts a prediction into the mouth of an employee of Airco[27] that the dissatisfaction caused by Angle's plant manager "would without question, in a short time have a union in your plant, and then their personnel would organize." The Union's demand for recognition followed this letter by only a few days and Angle's conclusion that Sims had written it lends

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27. Airco purchases gas from KRH and keeps several employees at the plant to facilitate deliveries.

credence to Sims' testimony that Angle discussed the Union's involvement more openly with him than with other employees. Moreover, Angle did not specifically deny this testimony of Sims. Accordingly, I accept Sims' testimony concerning Angle's statements during the interview.

Arel Rodgers testified that his interview with Angle lasted over 1-1/2 hours, Angle showed him a copy of a letter from the Union[28] and asked him whether he had received one. When Rodgers said he had not received a copy, although he was generally familiar with its contents. Angle said: "You mean to tell me you stuck your neck out at the hearing and they don't even bother to send you a copy of these things?"

Angle said, according to Rodgers, that he had spent a lot of time and effort in the building of his business and that he would not let a union or anyone else destroy it; there would be no election; and he would fire those that were for the Union and there would not be enough left to vote for it. Rodgers testified that he told Angle he intended to vote for the Union and that they needed a union but Angle told him to check with some of his other employees before deciding on what he needed. Rodgers also testified that Angle said that all of the senior operators were "union agitators" and that he was going to fire all of them.

Angle testified that Rodgers was the one employee he probably did not ask whether he signed a union card because Rodgers testified at the Board hearing. Angle also testified that he asked Rodgers why he had changed from being antiunion to prounion and inquired whether this change of attitude was due to the fact that he had received a 25-cent-per-hour raise when the others received 35 cents.

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28. The record does not show which letter was involved.

Angle testified that he told Rodgers that his lesser increase was due to the fact that his performance of duty was not as good as the others but that Rodgers answered that, in being prounion, he was speaking for the others at the plant.

Angle did not specifically deny Rodgers' testimony and it is accepted as reliable.

Dwayne Johnson testified that Angle opened the interview by saying that the rule governing the discussion was that "anybody that was not a hundred percent happy with his job and a hundred percent happy with the way Mr. Angle ran things would be fired;" Angle also said he would fire anyone who was wishy-washy or couldn't make up his mind whether he was "a hundred percent" happy and for Angle; and he would do this to make sure he got them all so that "when he got through firing people, there wouldn't be anybody left to vote for a union." Johnson also testified that Angle asked him how he intended to vote but that he pointed out that the ballot was secret and he wouldn't answer the question, and that Angle also asked him how many he thought would vote for the Union, to which he answered that he did not know.

Angle also said that "any time you punch a red tiger with a sharp stick you would get immediate violent action" and that it would be even easier for him to fire Johnson "after the Union got in - - - if it did."

According to Johnson, Angle said that there were "some long faces" around the plant after the Regional Director's decision holding the senior operators to be supervisors because "the instigators were big for the union and now they can't even vote."

Angle did not contradict Johnson's testimony and it is accepted.

John Wakulich, the only witness concerning the interviews who was not discharged and who became a senior operator in December 1966, was called as a witness by Respondent. He testified that his interview with Angle followed that of Sims and lasted about 2 hours; and that Angle asked him who had written the anonymous letters and he answered that he did not know. Wakulich also testified that Angle asked him whether he had signed a union card and whether he intended to vote for the Union; that he told Angle that he intended to vote against the Union. Angle said, according to Wakulich: "I want to get rid of the malcontents."

Angle did not contradict Wakulich's testimony and it carries significant weight, not only for this reason but because Wakulich must be regarded as a witness inclined to favor Respondent. Accordingly, his testimony is not only credible proof that Angle made these statements but it corroborates the parallel testimony of the other witnesses.

The testimony concerning the interviews is not in dispute. Based upon all of it, including that of Angle, there is no doubt that Angle opened each interview by indicating to the employee that his job was in jeopardy and that his continued employment would be dependent upon his statements during the interview. Angle admittedly asked each employee whether he signed a union card, from whom he had obtained it, and why he had signed it - - - all inquiries for which there was, at that time, no justification.[29] Angle also admitted asking each employee the names of those

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29. Respondent had long since taken the firm position that he would not bargain with the Union and there was no case pending for which such questions might constitute preparation. See: *Blue Flash Express, Inc.*, 109 NLRB 591, 592; *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 185 F.2d 732, 742-743 (C.A.D.C., 1950).

who had been talking about the Union and saying that he would find and fire the "malcontents" and "agitators." This interrogation and these threats were made under circumstances clearly coercive in character[30] and Respondent thereby violated Section 8(a)(1) of the Act.

More specifically, Angle's statement to Bishop and Harris, that if they wanted a union they should go to plants that have them, are threats of discharge for union activity and, therefore, violative of Section 8(a)(1).[31] His statement to Harris that anyone who was for the Union could not be happy in his work for Angle and was, therefore, a "malcontent," must be considered in connection with his statement to each of the employees who testified concerning the interviews that he would get rid of the "malcontents;" to several of them that anyone not "a hundred percent" for him was a "malcontent" and his statement that there would be no election because there would not be a sufficient number left to vote for the Union. This combination of statements also constitutes a threat of discharge for union activity violative of Section 8(a)(1).

There is also substantial evidence - - - and I find - - - that, in these interviews, Angle identified the senior operators as "union agitators" and said he would fire them; he threatened to fire everyone who had signed a union card; and he said he would not have a union in the plant. All of these statements, I find, constitute interference, restraint, and coercion of employees in their exercise of rights of self-organization and they are, therefore, violative of Section 8(a)(1) of the Act.

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30. *Bourne Co.* v. *N.L.R.B.*, 332 F.2d 47 (C.A. 2; 1964). See also: *Struksnes Construction Co., Inc.*, 165 NLRB No. 102.

31. *Crystal Tire Co.*, 165 NLRB No. 82.

e. *The Unilateral Pay Increase*

On September 21, the day following the discharge of the six employees involved herein, Respondent informed all the remaining employees (except two, who had been hired June 6 and July 17, respectively), of increases in their hourly wage rates, effective September 26, from $.15 to $1.00. This unilateral pay raise, the complaint alleges, constitutes both an interference with the employees' exercise of their right of self-organization and a failure by Respondent to bargain collectively with the designated representative of his employees. Neither of the submitted briefs deals with this situation.

The record shows that, in his letter dated July 27 to all the KRH employees, Respondent wrote:

> We have just completed a review and raised wages in all other divisions of the company. The question came up about raises for KRH employees. I have checked an found that the union can file unfair labor practices charges against us if we either give or promise to give new raises to any employees that the union claims to represent.

Shortly thereafter, the Union wrote Respondent a letter, quoting the above excerpt from his letter and stating:

> This is to advise you, and by copy of this letter to the National Labor Relations Board they are likewise advised, that the Oil, Chemical and Atomic Workers International Union will not file unfair labor practice charges against you or your company by reason of your granting to employees of KRH the same or similar wage increases as granted to your other employees so long as such wage increases are granted on an equitable and non-discriminatory manner, now or at any time before the NLRB election among KRH employees.

Had Respondent not discharged the six employees on September 20, and had the pay increases been granted in "an equitable and non-discriminatory manner," the Union might well be regarded as having waived its right to challenge this conduct. The limitation which it placed upon its waiver, however, precludes this interpretation, since the discharges are found herein to have been discriminatory. Accordingly, I find that this unilateral wage increase, with an election scheduled soon to be held,[32] constituted interference with the employees' right of self-organization violative of Section 8(a)(1).[33]

4. The discharges

Angle completed his interviews with the KRH employees on September 19 and, on the same day, prepared a letter of termination. The next day, at the plant, Angle had six employees sent to his office: Russell L. Bishop, John Harris, Russell Sims, Arel Rodgers, Dwayne Johnson, and Thomas B. Garrett. Angle handed each of them a copy of the letter of termination[34] and a check for their accrued pay and 2 weeks' severance pay, saying: "I don't like long good-byes; pick up your gear and get out." All of them left except Sims, who testified that he remained a few minutes and talked with Angle. According to Sims, he asked Angle why they had been discharged and Angle, after first referring Sims to the letter of discharge, went

32. The letter from the Board agent, informing Respondent that, because of the filing of the charge herein, the election would be indefinitely postponed, was dated September 21 and was, presumably, not received until the following day.

33. *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405.

34. It is to be noted that, despite the detailed and personal accusations in the letter, it appears to have been machine duplicated, with the name of each of the discharged employees separately typed, and that the identical letter was handed to all six of the employees discharged.

on to say that he had put all of his life's work into the KRH plant, that he would not permit the Union or the National Labor Relations Board to come in and tell him what to do, and that those discharged had caused the "trouble" at the plant. Angle also said, Sims testified, that if he got rid of these six it would scare the remainder of the employees at the plant, that some of those remaining had lied to him about signing union cards but that he would find them out and fire them as he intended to fire everyone who had "anything to do with it." Angle finished by saying that he had paid his attorney $5,000 so far but he didn't need a lawyer anymore and intended to take care of the matter his own way - - - that he had to do anything necessary to protect himself.

Angle did not dispute any of this testimony by Sims; none of it is inherently improbable and it is all consistent with other statements found herein to have been made by Angle on other occasions and to other employees. Accordingly, I find that Angle made the statements set forth above. They not only illuminate Respondent's motive in discharging these six employees but they also constitute threats of discharge violative of Section 8(a)(1).

The letter of dismissal opens by informing the employee that Angle was terminating the employment "for some of the following reasons." It then states that Angle's "entire life's work is at stake in the debts" on which the KRH plant is based, and that his relationship during the past 12 years with his 100 employees had been characterized by friendship on his part and, on theirs, "unquestioned loyalty and dedication" to Angle or "the growth of the Company." The letter then accuses the employee of being dissatisfied, of feeling justified in not cooperating, and of refusing to take orders.

Angle admitted, however, that none of the discharged employees had ever refused to take orders from him or

anyone who worked for him, except that he had "the recollection that this situation existed between Mr. Owens and Mr. Sims." When asked how the discharged employees had refused to cooperate, Angle said that he believed that they were cooperating: he also admitted that, just before the discharges, the plant's efficiency had reached its highest point, about 75 percent, and that "their performance was not the basis for their discharge."

After making the charges set forth above, the letter of dismissal continues:

> Further, you are completely insistent that I am going to change my lifelong concept, my business and my relationship with the other 100 employees, or else you are going to remain malcontent and dissatisfied in your job, and perhaps, not even do me the favor to continue to work for me.
>
> I am terminating your employment with me as a favor to both of us. I have never and will never allow anyone to work for me who is dissatisfied, malcontent, feels he is doing me a favor, refuses to accept my leadership in running my company.

Angle testified that he personally selected the employees to be discharged and that he ignored any recommendations by Tyler or Klein in making his selections. He also testified that every one of the six employees discharged had said, in his interview, that he wanted the employee policies reduced to writing.[35] But the quoted paragraph, I find, clearly indicates that Angle viewed the effort of his employees, led by these six, to designate the

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35. If the discharge of these employees was due to the fact that each of them had asked that the Company's employee policies be reduced to writing, their discharge would be violative of Section 8(a)(1) of the Act (*N.L.R.B.* v. *Washington Aluminum Company*, 370 U.S. 9).

Union as their collective-bargaining representative, as their insistence that he change his "lifelong concept"[36] which required that he discharge them.

In his testimony, however, Angle went beyond the reasons stated in the letters of dismissal and contended that he discharged these six employees because he had concluded that they were somehow involved in the three anonymous letters that he had received and which, in his opinion, had contributed to the dissension and "malcontent" in the plant.

There is a substantial amount of evidence in the record concerning these anonymous letters and, therefore, although I regard Respondent's preoccupation with them as a "red herring," i.e., a device to divert attention from the main question,[37] consideration must be given to them.

In the first place, all three of the letters were addressed and sent to Angle and, except for his action in circulating and posting the second one, with a covering letter of his own, they need not have come to the attention of any of his employees except those who wrote them.[38]

In the second place, none of the letters is abusive toward Angle. On the contrary, they appear to be trying to tell him of deficiencies in the operation of the KRH plant of which he might not otherwise have been informed.

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36. None of Angle's employees, in any of his enterprises, have ever been represented by a labor organization.

37. Angle may have been genuinely upset by the letters but, as shown by several findings herein, there is no doubt that he recognized that the real challenge to his unrestricted powers of management came from the self-organizational activities of the KRH employees. The effect of these letters in motivating Respondent's actions under examination in this proceeding was, I am convinced, inflated herein as a tactic of litigation.

38. Except for Wakulich, who testified that Sims showed him the second letter.

Nevertheless, Angle's reaction to the letters seems not only to have been overdeveloped, but unresponsive as well. This conclusion is not to be construed as an attempt, on my part, to sit in judgment on the direction or level of Angle's reaction: this is his prerogative and, if I were to find that his discharge of the six employees had in fact been based only upon their presumptuousness in having been connected with the writing of these letters, or any letters (except insofar as they might have constituted concerted activities for mutual aid or protection), he would not have committed an unfair labor practice in discharging them.

My function in connection with this proceeding, however, is to make a finding concerning Respondent's true reason for discharging these employees. In performing that function, I am required to take into consideration all the relevant and probative evidence on the subject - - - not just Angle's testimony. While Angle may have been irritated and upset by the failure of the writer, or writers, to sign these letters, there is nothing contained in them, or in their having been written and sent to him, so destructive of production or discipline in the plant as to justify the discharge of employees on the suspicion of having written them.[39]

There is substantial evidence in the record, on the other hand, which points to the conclusion that Angle's true reason for the discharge was his conviction that these six were the center and strong point of the Union's organizing campaign. Angle learned, during the interviews - - -

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39. It is unnecessary, in my opinion, to make a finding concerning which, if any, of the employees had written, or been involved in the writing of, these letters. Angle's testimony on his own conclusions is not clear: he testified that at one point that he was convinced that each of the discharged employees was either involved in, or had some knowledge of, the letters but he admitted he had no proof as to any of the employees.

if he had not known it earlier - - - that there was a strong feeling, among the KRH employees, that their fringe benefits and conditions of employment should be reduced to writing. To this demand Angle had reacted angrily, telling employees that their future would be best secured by absolute loyalty to him and reliance upon his sense of fairness, rather than on written documents. In his denigration of written conditions of employment, Angle was inferentially directing his attack, I find, at the prospect of a union contract, which would undoubtedly contain such conditions.

Angle's statements to Sims, after the discharges had been effected, showed beyond doubt that it was his intention to carry out the threat made several times earlier to several other employees: that he would see that there were not enough union sympathizers left in the plant to constitute a majority in favor of the Union.

It follows, therefore, that I reject Angle's claim that the employees were discharged because of some connection with the anonymous letters and I find that he discharged each of them to discourage their membership, and that of other employees, in the Union.

Respondent, foreseeing the possibility of the foregoing finding, contends that misconduct by three of the discharged employees, Sims, Garrett, and Johnson, nevertheless requires that they be denied any remedy of reinstatement. Respondent's basis for this contention is, as to Garrett, that he "failed to appear" at the hearing herein; as to Johnson, that he admitted to Wakulich that he could not hear conversations in the office of Plant Manager Owens from a position in the building rafters; and, as to Sims, that he abstracted company files, that he gave conflicting testimony, and that he "otherwise" misconducted himself.

The argument concerning Garrett is utterly without substance. The General Counsel presented the witnesses he believed necessary to adduce testimony and other evidence sufficient to prove the allegations of the complaint. Garrett was not among them. There is nothing in the record to indicate that Respondent made any effort to have Garrett present at the hearing and no request was made, during the hearing, for a subpoena to compel his appearance.

Although Wakulich's testimony concerning his conversation with Johnson is generally vague, he was clear in stating that the occasion on which Johnson said he was "in the rafters" was before Angle used that office for his interviews with the employees. Taking this testimony at face value, it fails to show that Johnson admitted being in the space above the offices for any improper purpose or that Johnson's remark was anything other than a casual statement in an innocent context.

The situation with respect to Sims is more complicated, since Respondent has exerted great effort to prove that Sims actually wrote one or more of the anonymous letters and was involved in the creation of others. As set forth above, however, I cannot find that the writing of these letters constituted misconduct at all - - - much less the heinous offense it appears to be in Angle's eyes.[40] Ac-

40. Angle several times stated that the aspect of the letters that troubled him was that they indicated that some of the employees were "dissatisfied" or "malcontent" and to Angle, therefore, dangerous. If this was Angle's primary concern, the writing of the letters could not constitute misconduct since, as previously stated, they were directed only to Angle. They did not insult him in any way (counsel's characterization of them as "obscene" is unconvincing), and they were an attempt to get Angle to repair the factors which were causing the discontent to which the letters pointed.

cordingly, I reiterate, in connection with Respondent's contention that Sims has forfeited his right to reinstatement, the same conclusion I stated in assessing the truthfulness of Angle's statement that he discharged Sims for his connection with the letters: namely, that it is not necessary that I make a finding concerning Sims' connection, if any, with the letters.

Respondent's argument that Sims should be denied reinstatement because of his "conflicting testimony" herein is rejected: any conflicts in his testimony have been given consideration in reaching conclusions on those matters which involved it. No authority is cited in support of Respondent's argument and I can see no relationship between any such conflicts and "misconduct" as used in this connection.

More serious questions are those relating to Respondent's contention that Sims abstracted papers from Angle's brief case and eavesdropped on Angle's interviews with the other KRH employees.

Assuming without deciding, however, that Sims did take some papers out of Angle's brief case during a recess in the interviews and that he attempted to overhear some of the conversations by listening from the nearby washroom, I am not convinced that this action constituted "misconduct" so serious under the circumstances as to justify a denial of reinstatement. It is settled Board doctrine that reinstatement may be denied to employees on the basis of misconduct "coercive in nature and calculated to instill fear of physical harm" in other employees.[41] In making such determination, moreover, the Board is required to weigh

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41. *N.L.R.B.* v. *Thayer Company*, 213 F.2d 748, 757 (C.A. 1; 1954); *H. N. Thayer Company*, 115 NLRB 1591, 1596 (1956); *Plastic Applicators, Inc.*, 150 NLRB 123 (1964), enforcement denied 369 F.2d 495 (C.A. 5; 1966).

the alleged misconduct of the employee against the unfair labor practices, if any, of the employer in the same connection. Here Sims' alleged misconduct is not only completely without taint of coercion against any other employee, but his acts were closely related to conduct by Respondent - - - the coercive interviews - - - held herein to have been in violation of Section 8(a)(1) of the Act and they were carried on by him in an effort to minimize or dispel Angle's coercive pressure on the employees engaged in activities protected by the Act.

Accordingly, I find no justification in the record for denial of reinstatement to any of the discharged employees.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, occurring in connection with its operations described in section I, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

The General Counsel urges that, in view of the egregious nature of Respondent's unfair labor practices and his declared intention to continue and repeat them until all union supporters have been discharged, the prescription herein of the usual remedy of backpay, less interim earnings, for the discharged employees would be inadequate to protect the public interest. By his unfair labor practices, he argues, Respondent has effectively discouraged his employees from exercising their guaranteed rights and has prevented them from selecting a collective-bargaining representative. In the present posture of the case, however,

it has not been decided whether the employees made a valid designation of a collective-bargaining representative or that Respondent has improperly refused to bargain with it. The application of the remedy urged by the General Counsel must, therefore, be determined on the basis of Respondent's conduct with respect to the discharged employees and his interference with the exercise of rights by the other employees found above.

Despite court approval of the *Woolworth* formula[42] and the Board's customary award of interest on backpay,[43] both of which can result in the receipt by a discharged employee of a sum that might exceed lost pay less interim earnings, and the statement of Mr. Justice Murphy, partially dissenting in *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 206, that ". . . nothing in the Act requires a backpay award to be determined by the amount actually earned . . . ." I am not convinced that the remedy requested by the General Counsel could be justified, under the circumstances of this case, as necessary or appropriate to effectuate the policies of the Act. Granted that Respondent's unfair labor practices were flagrant and that some of his statements may be construed as threats to continue or repeat them, it has not been shown that the normal processes and remedies of the Board and the courts will be insufficient to remedy them. The record does not show Respondent ever to have previously violated the Act - - - much less that he has been so persistent a violator that only by so drastic a remedial measure as that sought by the General Counsel herein could the purposes of the Act be effectuated. The proposal to eliminate, at this stage, the usual offset of interim earnings seems to me much closer to a

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42. *F. W. Woolworth Company*, 90 NLRB 289, 291; approved in *N.L.R.B.* v. *Seven-Up Bottling Company*, 344 U.S. 344.

43. *Isis Plumbing & Heating Co.*, 138 NLRB 716.

punitive than a remedial measure. Punitive measures have not been considered authorized by the Act and I shall not recommend this one.

Having found that Respondent has engaged in unfair labor practices violative of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. More specifically:

(i) Having found that Respondent has interfered with, restrained, and coerced employees in their exercise of rights guaranteed them in the Act, I shall recommend that he cease and desist from such conduct and post an appropriate notice.

(ii) Having found that Respondent discriminatorily discharged Russell L. Bishop, John Harris, Russell Sims, Arel Rodgers, Dwayne Johnson, and Thomas Garrett, I shall recommend that he offer each of said employees immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make each of them whole, for any loss of pay he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of his discharge to the date of his reinstatement, less his net earnings during said period. Such backpay shall be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and with interest thereon at the rate of 6 percent per annum as prescribed by the Board in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

In the view of the nature of Respondent's violations found herein, which go the heart of the Act, and his threats to repeat them, I shall recommend that Respondent cease

and desist from interfering in any manner with his employees' exercise of rights guaranteed in the Act.

Conclusions of Law

1. George A. Angle, doing business as Kansas Refined Helium Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Oil, Chemical and Atomic Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating employees concerning their union activities and the union activities of other employees; by threatening to discharge employees for union adherence and activities; by threatening to close the plant because of employees' union activities; by discharging six employees for concertedly requesting that plant working conditions be reduced to writing; and by granting an increase of wages to discourage employees from adherence to, or activities on behalf of, the Union, Respondent has interfered with, restrained, and coerced employees in their exercise of rights guaranteed in the Act and has thereby committed unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discriminatorily discharging Russell L. Bishop, John Harris, Russell Sims, Arel Rodgers, Dwayne Johnson, and Thomas Garrett to discourage their membership in the aforesaid labor organization, the said Employer has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the above findings of fact and conclusions of law, and upon the record in this case applicable to the issues involved in the findings of fact and conclusions of law, it is recommended that the Respondent, George A. Angle, doing business as Kansas Refined Helium Company, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating his employees concerning their adherence to, or activities on behalf of, Oil, Chemical and Atomic Workers International Union, AFL-CIO, or any other labor organization, or concerning such adherence or activities of any other employee; threatening to discharge employees for union adherence or activities; threatening to close his helium plant because of employees' union activities; discharging employees for concertedly requesting that plant working conditions be reduced to writing; or granting wage increases to discourage employees from adherence to, or activities on behalf of, any labor organization; provided, however, that nothing herein shall be construed as requiring Respondent to withdraw benefits heretofore granted.

(b) Discriminating in regard to tenure of employment or any term or condition of employment against any employee to discourage membership in adherence to, or activities on behalf of, the aforesaid labor organization or any other labor organization.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Offer to Russell L. Bishop, John Harris, Russell Sims, Arel Rodgers, Dwayne Johnson, and Thomas Garrett immediate and full reinstatement to their former or substantially equivalent positions to those which they held

immediately prior to September 20, 1966, without prejudice to their seniority and other rights and privileges and make each of them whole for any loss of pay they may have suffered by reason of the discrimination against them in the manner set forth in the section of the Preliminary Decision entitled "The Remedy."

(b) Notify Russell L. Bishop, John Harris, Russell Sims, Arel Rodgers, Dwayne Johnson, and Thomas Garrett, if presently serving in the Armed Forces, of their right to full reinstatement in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to ascertain any backpay due under the terms of this Recommended Order.

(d) Post at his plant at Otis, Kansas, copies of the attached notice marked "Appendix."[44] Copies of said notice, on forms provided by the Regional Director for Region 17, after being signed by Respondent, shall be posted by him immediately upon receipt thereof, and be maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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44. In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

(e) Notify the Regional Director for Region 17, in writing, within 20 days from receipt of this Decision, what steps he has taken to comply herewith.[45]

IT IS RECOMMENDED that the allegations of the complaint concerning interference, restraint, and coercion of employees in the exercise of their rights of self-organization, insofar as not found in the Preliminary Decision herein, and insofar as they do not arise out of the allegations of refusal to bargain, be dismissed.

Dated at Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, I hereby notify my employees at the Kansas Refined Helium Company plant that:

> I WILL NOT coercively interrogate my employees at that plant concerning their adherence to, or activities on behalf of, Oil, Chemical and Atomic Workers International Union, AFL-CIO, or any other labor organization, or such adherence or activities of any other plant employee.
>
> I WILL NOT threaten to discharge any employee for union adherence or activities and I WILL NOT threaten to close the plant because of employees' union activities.

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45. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 17, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

I WILL NOT discharge any employees for concertedly requesting that plant working conditions be reduced to writing.

I WILL NOT grant wage increases to discourage employees from adherence to, or activities in behalf of, the above union, or any other labor organization - - - but nothing in the Preliminary Decision of the Trial Examiner requires that I rescind or cancel any wage increase or other benefit heretofore granted.

I WILL NOT, in any manner, interfere with, restrain, or coerce my employees in the exercise of their rights of self-organization; to form labor organizations; to join or assist Oil, Chemical and Atomic Workers International Union, AFL-CIO, or any other labor organization; to bargain collectively through representatives of their own choosing; to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

I WILL, upon request, reinstate Russell L. Bishop, John Harris, Russell Sims, Arel Rodgers, Dwayne Johnson, and Thomas Garrett to the same, or substantially equivalent, positions to those which they held immediately prior to September 20, 1966, without prejudice to their seniority and other rights and privileges, and will make them whole for any damage they may have suffered by reason of the discrimination against them by paying each of them a sum of money equal to that which he would normally have earned as wages from the time of his discharge to the date of his reinstatement, less net earnings during said period, computed quarterly and with interest thereon at 6 percent per annum.

I WILL notify Russell L. Bishop, John Harris, Russell Sims, Arel Rodgers, Dwayne Johnson, and Thomas Garrett if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the

Selective Service Act and the Universal Military Training and Service Act, as amended, after their discharge from the Armed Forces.

All my employees are free to become and remain, or to refrain from becoming or remaining, members of Oil, Chemical and Atomic Workers International Union, AFL-CIO, or any other labor organization.

GEORGE A. ANGLE, doing business as KANSAS REFINED HELIUM COMPANY

(Employer)

Dated ..... By .....

(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 610 Federal Building, 601 East 12th Street, Kansas City, Missouri, 64106, Telephone FR 4-5181.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Cases 17-CA-3021

17-CA-3021-2

GEORGE A. ANGLE, doing business as KANSAS REFINED HELIUM COMPANY,
Respondent

and

OIL, CHEMICAL AND ATOMIC WORKERS IINTERNATIONAL UNION, AFL-CIO,

Charging Party

Gerald A. Wacknov, Esq., and *R. L. De Prospero, Esq.*, for the General Counsel.

Patrick F. Kelly, Esq., of Wichita, Kans. (*Frank* and *Kelly*), and *John R. Todlock, Esq.*, of Denver, Colo., for the Charging Party.

Marvin J. Martin, Esq., and *W. Stanley Churchill, Esq.*, of Wichita, Kans. (*Martin, Wooley & Grey*) for the Respondent.

TRIAL EXAMINER'S SUPPLEMENTAL DECISION

SIDNEY D. GOLDBERG, Trial Examiner: As set forth in my Preliminary Decision, issued September 12, 1967, the complaint in this consolidated proceeding[1] al-

1. Issued November 16, 1966, on charges filed September 21 and 22, 1966, and an amended charge filed November 1, 1966. It was thereafter amended at the hearing on January 19, 1967.

leges that George A. Angle, in the operation of his enterprise under the name Kansas Refined Helium Company (herein sometimes called Respondent, KRH, or the Company), interfered with, restrained, and coerced employees in their exercise of rights guaranteed them in the Act; discriminatorily discharged six employees to discourage their membership in the Oil, Chemical and Atomic Workers International Union AFL-CIO (herein called the Union), and, although the Union was the designated collective-bargaining representative of his employees in an appropriate unit, refused to bargain with it, thereby violating Section 8(a)(1), (3) and (5) of the Act.

After the trial before me at Great Bend, Kansas, on January 18, 19 and 20, 1967, and prior to the issuance of my decision on the issues therein presented, the Regional Director issued an order vacating the Decision and Direction of Election in Case No. 17-RC-5126, involving the Respondent herein. Since it was on the basis of this Decision and Direction of Election, and the Board's denial of review thereof, that I had rejected, at the trial, any evidence to controvert the allegation of the complaint that the unit therein set forth was an appropriate one for the purposes of collective bargaining, the vacatur of the Decision and Direction of Election which vitiated its standing as a substantially unassailable basis for a finding of appropriate unit in this case,[2] made it necessary, to afford Respondent a fair hearing herein, that he be permitted to adduce evidence on the subject. Accordingly, I ordered the record reopened for that purpose.

To avoid delay, however, in the disposition of issues not affected by the vacatur of the Decision and Direction of Election, I issued the said Preliminary Decision dispos-

2. See: *Charles F. Reichart*, 124 NLRB 28.

ing of the issues not dependent upon a finding of appropriate unit for collective-bargaining purposes.

The issues set forth in my order reopening the record came on for trial before me at Wichita, Kansas, on August 9 and 10, 1967. All parties were represented, afforded an opportunity to adduce relevant evidence, cross-examine witnesses, and argue on the facts and the law. Supplemental briefs were subsequently filed by the General Counsel and by counsel for Respondent. The General Counsel's post-hearing motion to receive an additional exhibit was granted on the terms set forth in the order granting the motion.

In my Preliminary Decision, I found that Respondent had interfered with, restrained and coerced his employees in their exercise of rights guaranteed by the Act, that the senior operators were not supervisors within the meaning of the Act, and that Respondent's discharge of Dwayne Johnston, Russell M. Sims, Arel Rodgers, Thomas B. Garrett, Russell L. Bishop and John S. Harris, was discriminatorily motivated to discourage membership in the Union.

The issues remaining in this case, and now to be decided, are:

(i) whether the unit set forth in the complaint, and stated by the Union in its demand for recognition, is an appropriate one for the purposes of collective bargaining.

(ii) whether the Union, at the time of its demand, represented a majority of Respondent's employees in that unit; and

(iii) whether Respondent's refusal to recognize the Union as the collective-bargaining representative of his employees in the said unit was based upon a good-faith doubt concerning its representative status.

For the reasons hereinafter set forth in detail, I find that the stated unit was an appropriate one for the purposes of collective-bargaining; that at the time of its demand for such bargaining the Union was the designated representative of a majority of Respondent's employees in that unit; that Respondent did not have a good-faith doubt concerning the status of the Union as such designated representative and that Respondent unlawfully refused to bargain with it, thereby violating 8(a)(5) and (1) of the Act.

Upon the entire record herein, and the demeanor of the witnesses, I make the following:

Supplemental Findings of Fact[3]

III. The Unfair Labor Practices

A. *Chronology and Issues*

2. Chronology

a. *Demand for Recognition and Refusal*

The statements on this subject in the Preliminary Decision were limited to those relevant to the issues dealt with therein. They are, however, also relevant to the issues now under consideration and are incorporated at this point, together with the additional fact that the card used by the Union was that herein set forth in facsimile:

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3. Since this decision is supplemental to the Preliminary Decision heretofore issued, all statements, findings, and reasons in that decision are incorporated by reference herein. For clarity, therefore, the symbols designating the sections and paragraphs of this decision are identical with those of the sections and paragraphs of the Preliminary Decision. In addition, references to statements made "above" may refer to statements in my Preliminary Decision.

Printed in U. S. A. Form 6

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION

MEMBERSHIP APPLICATION

Local No. ..... Date .....

Name .....
Please Print

Address ..... City .....

Company ..... Clock No. .....

Department ..... Classification .....

Amount of Fee $ ....
Init - Rein - Ex-service

I hereby accept membership in and designate and authorize the Oil, Chemical and Atomic Workers International Union, as my collective bargaining agent in all matters pertaining to wages, rates of pay and conditions of work.

....
Witness Member's Signature

[Receipt attached]

B. *Discussion and Findings*

2. The refusal to bargain

a. *The unit*

(1) Background

The complaint alleges, as appropriate for the purposes of collective bargaining, a unit consisting of:

All production and maintenance employees at the Respondent's plant, including instrument men and

plant-clerical employees, but EXCLUDING office-clerical employees, casual and temporary employees, professional employees, guards, and supervisors within the meaning of the Act; and, employees of other operations of George A. Angle.

Both the Union's petition and its letter requesting recognition refer to a unit of "production and maintenance employees." There is nothing in the record to show that either the instrument men or plant-clerical employees were intended to be excluded from the units set forth in the petition or the Union's letter. At the representation hearing, Respondent interposed no objection to the Union's request to amend its petition to include the single plant-clerical employee and the one instrument man then in the plant appears on the list of plant employees prepared by Respondent.[4] No issue has ever been raised herein concerning the propriety of including the instrument men as production and maintenance employees and, accordingly, I find that no variance was created by the specific inclusion of these employees in the unit alleged in the complaint.[5]

When this case was first tried, the representation proceeding was still pending. The Union's request for review of the Regional Director's Decision and Direction of Election in that proceeding was restricted to his finding that the senior operators were supervisors and, therefore, excluded from the unit. Respondent's opposition to the request was likewise limited to this finding. The Board's

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4. I note from the transcript of the representation hearing that Angle, in his very first comment concerning the plant employees, restricted the number of supervisors to three. These would be, necessarily, the plant manager, the production engineer and the chief of maintenance, thus clearly showing that he did not, at that time, regard the four senior operators as supervisors.

5. See: *The Maxwell Co.*, 164 NLRB No. 97; TXD fn. 40.

telegraphic decision, moreover, expressly denied review except on this single question, which it reserved for determination through the "challenged ballot" procedure. Accordingly, at the time of this first trial, the unit set forth in the Regional Director's Decision and Direction of Election was foreclosed from relitigation by Section 102.67(f) of the Board's Rules and Regulations. The status of the evidence on this issue having been modified by the procedural change set forth above, and by the taking of additional evidence thereon, it will now be discussed on the basis of a complete record.[6]

(2) Applicable principles

In discussing the question of "appropriate unit" for collective-bargaining purposes, it seems superfluous, at this late date, to point out that there is no particular group of employees which constitutes *the* appropriate unit under particular circumstances, but that each situation arises because a certain group of employees, delineated by an interested person for its own benefit, is designated "an appropriate unit" and the Board's confirmatory decision sought for that delineation.[7] This point must be made, however, because Respondent's able and experienced counsel, although conceding that each of the several possible groupings of Respondent's employees set forth in his brief would constitute a unit appropriate for collective-bargain-

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6. The testimony at the representation hearing held August 9, 1966, was received in evidence in this case pursuant to a stipulation by the parties that each of those witnesses, if called herein and asked the same questions, would give the same answers. Accordingly, that testimony is treated as if given in the case.

7. *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485, 491; *N.L.R.B.* v. *Dewey Portland Cement Co.*, 336 F.2d 117 (C.A. 10; 1964).

ing purposes, forcefully argues that the unit chosen by the Union herein, and approved by the General Counsel through the complaint, is one that cannot possibly be considered appropriate.

To be preliminarily disposed of is Respondent's "straw man" in the shape of a claim that the General Counsel, in relying upon a "presumption" of the appropriateness of a plant-wide unit, has thereby failed to sustain the burden of proof necessary to prove his case. The short answer is that any recognized presumption of law, if applicable to the facts which have been proved, takes the place of further proof and leads—in the absence of contrary proof by the opposite party (where the presumption is non-conclusive)—to the indicated result.[8]

Although, therefore, I put this claim aside as specious, Respondent is nevertheless accurate in pointing out that the Board has also repeatedly stated that employer-wide units are "presumptively appropriate." The explanation for these apparently conflicting "presumptions" is to be found in the fact that the Board, in determining the appropriateness of a particular unit for collective-bargaining purposes, is performing its regulatory or licensing, rather than its adjudicatory, function. Accordingly, when it uses the words "presumptively appropriate," it is neither creating nor invoking a presumption of law to make a factual finding, but it is using those words in their ordinary, communicative, sense to indicate that the unit under examination seems, absent a showing of countervailing factors, to be a reasonable one for the statutory purpose. This explanation, together with the broad discretion conferred by the Act on the Board to determine appropriate units, accounts for the coexistence of "presumptions" of

8. See: IX *Wigmore on Evidence* §2491.

appropriateness for *both* plant-wide and employer-wide units when proposed by applicants under the Act, since Section 9(b) lists "employer unit, craft unit, plant unit, or subdivision thereof" as units appropriate for the purposes of collective bargaining.[9] In view of the Board's broad

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9. This dichotomy in the Board's functioning is recognized and explained by the court in *N.L.R.B.* v. *Krieger-Ragsdale & Co.*, 379 F. 2d 517 (C.A. 7; May 1967). In that case the Board had designated, as appropriate units, two separate groups of employees of the same employer working in the same plant: one of lithographic employees and the other of bindery, shipping and receiving employees. The employer contended that only a single, plant-wide unit could be appropriate and that there was not substantial evidence to support the Board's decision. Rejecting the employer's contention and enforcing the Board's bargaining order, the court wrote:

> Section 9(b) of the Labor Management Relations Act gives the Board discretion to determine appropriate bargaining units; and the Board's informed exercise of discretion is rarely to be disturbed. E.g., *Packard Co.* v. *N.L.R.B.*, 330 U.S. 485; *N.L.R.B.* v. *Weyerhaeuser Company*, 276 F. 2d 865 (C.A. 7; 1960). The same cases state that substantial evidence is also an applicable standard of review.
>
> These standards, however, are not merely alternative formulations of a single standard. They differ in substance as well as form, and in the instant case, it is necessary to distinguish them in order to express clearly the functions of this court on review of unit determinations.
>
> The discretion which the Board is entitled to exercise lies in the area of establishing, case by case, those facts which it deems generally relevant, but not conclusive, in the drawing of inferences. The discretion is exercised when the Board finds some set of relevant facts determinative in a particular case. Cf. Jaffe, Judicial Control of Administrative Action 555-56 (1965). The determination is discretionary because the relevancy and import of similar facts may shift from case to case.
>
> Unit determinations fall into this category of discretionary decisions. Unit determinations are not findings of fact, but judgments upon the facts in accordance with varying guidelines of relevancy or rules of inference based upon experience and the purpose of the statute being administered. Because the exercise of discretion of relevancy in a particular case, prior Board unit determinations in other cases have precedential value only in the sense that they disclose facts the Board has previously considered relevant.

discretion, therefore, any unit proposed, which is not inconsistent on the facts with the wide range set forth in the Act, could be labeled "presumptively appropriate" and regarded as adequate; i.e. "appropriate," for the purpose of collective bargaining in the absence of a contradictory showing.[10] Cases cited by Respondent as specifically applicable herein are discussed with the conclusions set forth below.

(3) Respondent's operations

After starting as a geological clerk for Sinclair Prairie Oil Company in 1940 and a long interruption for military service, George A. Angle began to build his complex of gas and oil enterprises in 1954 when he adopted the tradename Frontier Oil Company and hired his first office employee. During 1954 and 1955 he conducted geological explorations for oil and gas, taking mineral leases and hiring contractors to drill the wells. He found that, in the year 1955, he had entered into such contracts sufficient in extent to keep a drilling rig busy for a full year. Rea-

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10. The effect of, and the manner of operation under, these "presumptions" is illustrated by the decision in *Miratile Manufacturing Co., Inc.*, 124 NLRB 48, in which the Board wrote:

> Moreover, a two-plant unit is, in fact, employerwide. It is, therefore, a type of unit specified in the Act, and is presumptively an appropriate type of unit. However, the appropriateness of a broad unit does not preclude the appropriateness of a smaller one where there are, as here, factors that show that the smaller unit may also be appropriate.

Similarly, in *Western Electric Co.*, 98 NLRB 1018, cited by Respondent, the Board, in the course of a long and detailed opinion, wrote:

> . . . it may be stated as a general rule that, absent any statutory considerations, the Board does not refuse to grant a company-wide unit to a labor organization unless it is affirmatively shown that a smaller one is more appropriate.

To the same effect is *Sav-On Drugs, Inc.*, 138 NLRB 1032, also cited by Respondent.

soning, he testified, that he could earn the contractors' profit for himself if he owned a rig, he bought one, designated that enterprise Red Tiger Drilling Company and hired personnel to operate it. Later that year he purchased a cable-tool unit to complete the wells drilled by Red Tiger Drilling; he named this operation Great Plains Drilling Company and hired employees for it. In 1957 and 1958, he added additional leases and wells to his holdings and, in 1959, purchased a second drilling rig, to which he gave the name Red Tiger No. 2 and for which he hired operators.

To support his drilling and finishing operations, Angle required trucking services and he obtained them by contract. When he found that his needs would justify the purchase of trucks, he bought them, called the operation Red Tiger Trucking Company, and hired the necessary operating employees. On the same basis, he subsequently formed Red Tiger No. 3 and added a second rig to Great Plains Drilling; he formed Hayes Tank Service to carry water to the drilling sites; he sat up Red Tiger Caterpillar to clear and to move the earth at those sites, and he established Comanche Supply Company to purchase supplies for all of his operations.

Angle's purpose in separately naming and operating these enterprises, he testified, was to keep a constant check on the profitability of their operations. Moreover, with the exception of Frontier Oil, which is the name of his general operation, and possibly, of Great Plains Drilling, all of Angle's enterprises are kept busy to their fullest capacity so that, when there is no work for them within his organization, they operate under contracts with other people who require their specialized services.

Until 1965, Angle sold the gas and oil from his wells to refiners. He knew, however, that the natural gas in

that area contained a substantial amount of helium and, in 1964, he entered into a contract with American Messer, a company specializing in the construction of gas refineries, to construct a plant for him so that he could extract the helium component of the gas flowing from his wells and sell that refined gas to industrial wholesalers or consumers.

A brief account of the progress—and some of the problems—of the construction of the Kansas Refined Helium plant, its commencement of operations in late 1965, and its ultimate delivery to Angle about April 1966, have been sketched in my Preliminary Decision herein. Like all his other enterprises, the plant is owned—subject to loans—solely and directly by Angle but, also like the others, the records concerning its operations are kept separately so that Angle can be fully informed concerning its efficiency and profitability.

Although Respondent was given an opportunity, when the record was reopened August 9, to show changes, if any, in the operation of the plant since the trial in January, it was conceded that there have been no substantial changes in its operation or in its interrelationships with Angle's several other enterprises since that time. Accordingly, the evidence given at the trials in both January and August will be drawn upon, without distinction, in examining and deciding the issues herein.

In support of his contention that the production and maintenance employees of the plant do not constitute a unit appropriate for collective-bargaining purposes, Respondent adduced evidence claimed to show that:

(i) all of Angle's enterprises are involved in the production of gas and oil, are owned and managed by Angle from a single office, and are engaged in an integrated process to produce and sell oil, gas and refined helium;

(ii) there is a substantial interchange of employees, both temporary and permanent, among the various operations and their skills are similar;

(iii) at least two additional non-supervisory employees, the pipeline riders, are vital to the plant's operation and have no other operating affiliation so that they, at least, must be included to make the unit an appropriate one;

(iv) all of the operations are conducted in close geographical proximity to each other; all of the gas wells (except the first 12 completed) feed into the plant; and an inventory of pipe and other supplies for all of Angle's operations are stored on Angle-owned property in the immediate vicinity of the plant;

(v) all employees in the various operations enjoy (or will soon enjoy) the same employment benefits;

(vi) all of the operations have the same collective-bargaining history: i.e., none.

Respondent further contends that the *only* basis for the allegation of this unit in the complaint is the extent of the Union's organization and that the establishment of a unit on that basis is prohibited by Section 9(c)(5) of the Act.

There is no dispute, nor could there be, that Angle is the sole owner and operator of the several enterprises described above; that they are all concerned with crude oil and natural gas; that he maintains, for all of his enterprises, the records he requires at his office in Wichita; and that he is the final authority, as to all of them, on all matters of management, finance and labor policy.

Although these circumstances might justify the designation of a unit of all of Respondent's employees as appro-

priate had a labor organization sought to represent them, that is not the issue in this case. As stated above, and as Respondent's counsel concedes, there are several possible groupings of Angle's employees into units that might be designated as appropriate for the purposes of collective bargaining.

Similarly, there is no doubt that there is a continuity of effort by Angle and his employees from the time a gas mineral lease is executed, through the drilling and completion of the well, the construction of the pipeline from the well-head to the gas refining plant, the refining of the gas, and its delivery to the dealer or user, that might also justify the designation of a unit of all employees engaged in the production and refining of gas as appropriate for the purposes of collective bargaining. But here again, no labor organization seeks to represent these employees and the question need not be decided.

The record shows that the Kansas Refined Helium plant is a well-defined manufacturing installation, self-contained and requiring only the continuous supply of raw material for operation.[11] It has a full supervisory staff with Norman Klein, the comptroller of all of Angle's operations, acting as general manager of the plant; Henry Tyler,

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11. The function of the plant in *Lion Oil Company*, 90 NLRB 102, cited by Respondent, was an adjunct to, integrated with, and necessary for the operation of the field. It created no substantial product but merely assisted in getting the owners' real product, oil, out of the ground for sale. The degree of integration, moreover, was shown by the fact that the employees were freely interchangeable and that the entire operation was under the supervision of a single production superintendent. In this case, the Kansas Refined Helium plant operates *in line with* Angle's gas wells and simply carries the process one distinct step forward. Instead of refining the gas in his own plant, Angle had, prior to 1966, sold the raw gas to others for refining. Moreover, the plant can, and does, refine helium gas from sources other than Angle's wells; viz., the Government line.

an engineer specially trained and experienced in cryogenic (low temperature) engineering, as production manager, and John Stiff, in charge of the maintenance of the plant and its machinery. There is a complete and permanent complement of operating and maintenance personnel organized in shifts to keep the plant running 24 hours a day, 7 days a week. While Norman Klein, its general manager, is also comptroller of all of the Angle enterprises, it appears from the record that Klein does not spend all of his time at the plant and that, under the direction of Tyler and Stiff, the plant is an autonomous operation. Accordingly, I agree with the argument of the General Counsel that the production and maintenance employees of the plant, with such exclusions as are customary, constitute presumptively an appropriate unit, and in the absence of evidence to show otherwise, will be so found.[12]

There are, however, two points which I consider substantial that are made by Respondent in support of his contention that the production and maintenance employees at the Kansas Refined Helium plant do not constitute an appropriate unit: (i) that employees of other Angle enterprises devote a portion of their time working in the plant, and (ii) that the unit is incomplete without the inclusion of the two pipeline riders.

Respondent's time records show that employees of Great Plains Drilling Company have, on occasion, performed services at the Kansas Refined Helium plant. Elmer Snyder and Leo Baum, drillers employed by Great Plains Drilling Company, testified that, when their rigs were not operating and they wished to keep working, they were sent either to Red Tiger Trucking, where they worked as truckers' helpers, or to the Kansas Refined Helium plant,

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12. *Appliance Supply Company*, 127 NLRB 319; *Southern Paperboard Corporation*, 112 NLRB 302.

where they did any maintenance work assigned to them.[13] There is also evidence that employees normally with other Angle operations from time to time assisted in making connections in the pipeline system or to the compressors which assist in the flow of gas through the pipelines. These employees received, whatever they were doing, the wage rates which they received while on their regular jobs.

In all of this activity, however, I can find no substantial or regular pattern that would justify a conclusion that the employees of Kansas Refined Helium do not constitute an appropriate unit by reason of these occasional services performed by other Angle employees. These additional services are performed on a casual basis, the primary interest of the employees is in another operation, and there is nothing to show that the employees have a sufficient community of interest with the regular employees at the plant to warrant their inclusion in the unit.[14]

The situation with respect to the two pipeline riders is not nearly so clear and Respondent makes the appealing argument that these two employees, if not part of the plant organization, are part of no organization in which they can be represented for collective-bargaining purposes.

While the record does not support the statement in Respondent's brief that the pipeline riders check in at the plant twice a day to find out whether the gas flow is adequate, there may be some justification for including them in the unit. The description of the unit in the complaint however, would not preclude their inclusion if they are—and they may be—maintenance employees. The only obstacle seems to be the claim of Respondent that the

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13. The exhibits showing summaries of Respondent's time records are received in evidence.

14. *Georgia Highway Express, Inc.*, 150 NLRB 1649; *Piggly-Wiggly El Dorado Co.*, 154 NLRB 445, 449.

General Counsel's reading of the unit description as set forth in his brief, requires that their place of employment be *at* the plant.

As against Respondent's belated concern for the collective-bargaining aspirations of the pipeline riders, I direct attention to his concession, at the representation hearing, that a production and maintenance unit—if held appropriate notwithstanding his contention that it was inappropriate—would consist of the list of employees which he prepared at that time and which did not include the pipeline riders. Since this argument is made at this late date by Respondent, and not by the excluded employees, I am convinced that he is estopped to rely upon it and I reject the argument.[15]

Accordingly, I find that the unit set forth in the complaint is an appropriate one for collective-bargaining purposes.

The stipulated list of Respondent's KRH employees, as of June 30 or July 1, when he received the Union's demand, contains 22 names, including those of the 4 senior operators. Since I have found, in the Preliminary Decision, that the senior operators are not supervisors, they are included in the unit found appropriate herein and it follows, therefore, that these 22 are the employees involved.

b. *The Union's status as representative*

As stated above, Union Representatives Patton and Williams came to Great Bend at the request of one of the

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15. As noted below, 18 of the 22 employees in the production and maintenance unit validly designated the Union as their representative and the addition of 2 more of the unit would not impair the majority status of the Union. There is, moreover, nothing in the record to support Respondent's argument that the designation of the unit is based solely upon the extent of organization.

KRH employees and they held a meeting with several employees on June 22. At this meeting, Russell Sims, Arel Rodgers, Dwayne Johnson, and John Harris signed Union application cards. On or before June 30, according to the General Counsel's evidence, 12 more cards were signed and, on July 2, 2 more, making a total of 18 employee designations of the Union in the unit containing 22. All of these cards were received in evidence on the basis of proof that they had been actually signed by the employees whose names appear thereon and Respondent has not raised any issue with respect to their authenticity.

Several arguments are made by Respondent, however, in support of his contention that the cards, although signed, do not constitute effective designations of the Union by those employees.

Respondent's argument that the cards, because they are entitled "Membership Application" and the text is in "fine print," are ineffective as union authorizations according to their terms, is too attenuated to require serious consideration and is hereby rejected.

In further support, however, of his argument that the Union was not designated as bargaining representative by a majority of the employees, Respondent contests the validity of some of the cards on the basis of defects on their face, and he contests their validity, generally, on the ground that the signers were told, directly and by Union literature, that the purpose of the cards was "merely" to hold an election.

It is to be noted, preliminarily, that the employees involved in this case were engaged in tasks requiring frequent reference to technical manuals and the exercise of considerable intelligence. Not only is it clear that every one of them could read and write, but their jobs actually require an ability to comprehend the material they read.

Moreover, the Union card, set forth in facsimile above, is brief, clear, and unequivocal, and it makes no reference to an election. The signature, therefore, of a literate person who has read it to a statement that

> I hereby . . . designate and authorize the . . . Union as my collective bargaining agent in all matters pertaining to wages, rates of pay and conditions of work

would normally be—and in this case, I find, is—substantial *prima facie* proof of such designation. The Board, with Court approval, has consistently held that such proof cannot be overcome except by substantial evidence that the cards were solicited on the representation that they would be used *only* to secure an election.[16]

In support of Respondent's argument that the signing employees were told that the cards were "merely"[17] for an election, the record shows that several pieces of Union literature were in circulation among the employees beginning June 22, when the first cards were signed. One of these, a booklet of 20 pages, is entitled "You're invited" and, generally, explains the advantage of belonging to a union. In this booklet, two pages—including a half-page illustration--under a heading "How do you organize?" are devoted to a description of an organizing procedure which includes the signing of "authorization cards," the filing of

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16. *Cumberland Shoe Corp.*, 144 NLRB 1268, enforced 351 F. 2d 919 (C.A. 6; 1965); *Jas. H. Matthews & Co.*, 149 NLRB 161, enforced 354 F. 432 (C.A. 8; 1965), cert. den. 384 U.S. 1002; *Bernard S. Happach*, 151 NLRB 560, enforced 353 F. 2d 629 (C.A. 8; 1965); *Gotham Shoe Mfg. Co.*, 149 NLRB 862, enforced 359 F. 2d 684 (C.A. 2; 1966); *Furr's Inc.*, 157 NLRB No. 38, enforced 381 F. 2d 562 (C.A. 10; 1967), cert. den. Oct. 9, 1967; *The Shelby Manufacturing Company*, 155 NLRB 464; *Brandenburg Telephone Company*, 164 NLRB No. 26.

17. The words "merely," "only," and "solely," as used in this context, all connote exclusiveness and they are interchangeable.

a petition with the Board, and the holding of a Board election. The illustration that takes up half of one of these pages shows people voting. The description ends with the statement:

> If more than half the people balloting vote for OCAW then you have adopted this union as your official collective bargaining agency.
>
> You and your fellow workers then set up your local union structure within the OCAW.

If the Union's entire presentation, oral and written, to prospective card signers consisted of these two pages, a reader thereof might reasonably conclude that the signing of authorization cards was but a single, inconclusive, step in a series of events which, if successfully concluded by a majority vote for the Union, would constitute the designation of the Union as collective-bargaining agent for the group.[18] Respondent, however, in basing his argument on the presumption that the card signers read, and were influenced by, the contents of these two pages, must necessarily also presume that the same card signer had read the entire booklet of 20 pages extolling the advantages of union membership, including the final page which is in the form of a slightly different authorization card and to which his attention was specifically directed in the two-page description of procedure. The card, after the identification of the signer, reads as follows:

> I hereby designate and authorize the Oil, Chemical and Atomic Workers International Union, AFL-CIO, as my collective bargaining representative in all matters pertaining to wages, rates of pay and conditions of work. I also hereby authorize said Union to request recognition from my employer as my bargaining agent

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18. Compare: *Bauer Welding & Metal Fabricators, Inc.* v. *N.L.R.B.*, 358 F. 2d 766 (C.A. 8; 1966).

> and/or to petition the National Labor Relations Board for an election for certification of said Union as my bargaining representative.

The language of this card, incorporated by reference into the description of procedure on the two earlier pages, clearly sets forth alternative procedures for the Union's use of the cards: i.e., either to make a request for recognition or to file an election petition.

While one other piece of Union literature makes reference to an election,[19] several other leaflets present only the arguments in favor of belonging to a union. One of these other leaflets makes the statement, without any reference to an election, that:

> When all of the workers organize and send a committee in to see the manager, he will listen.

But even if it were assumed that every employee who signed a card had first read all of the Union literature and interpreted it as contended for by Respondent, the record shows that every one of them, also prior to signing his card, had at least one conversation with another person on the subject of the Union or the cards. Accordingly, no blanket rejection of the cards, as employee designations of the Union, would be justified on the basis of an analysis of the import of the Union's literature.

Respondent's brief does not designate any specific cards claimed to be invalid for reasons other than the general ones set forth above, except that it points out that three cards, shown by testimony to have been signed the

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19. The ten-page pamphlet entitled "Look out below," which warns employees not to be diverted from their organizing efforts by predicted employer devices, states, at the bottom of its final page:

> While you're waiting for election day, the day you make the great decision, keep looking out for the blockbusters.

same evening, bear different dates.[20] Objection was made during the hearing, however, to some of the cards and, accordingly, each card is separately adjudicated herein on the basis of the evidence concerning the circumstances of its execution.[21] An observation appropriate to be made at this point is that, in assessing the weight of conflicting testimony and the demeanor of the witnesses to make resolutions of credibility, I have given consideration to the impact on the witnesses of relevant occurrences subsequent to the events involved in their testimony. The cards were signed in June and early July: thereafter, in July, August and September, Respondent carried on a vigorous antiunion campaign culminating in the discharge of six employees on September 20. These statements and actions by Respondent could not fail to have had some effect on the testimony of those who were still in Respondent's employ.[22] While there are, fortunately, some people who

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20. Two bear the date July 2 and one is dated June 30.

21. Much is made by Respondent of the admission by Union Representative Patton that, although his signature appears on several of the cards as witness, he did not actually see them signed. Each card was adequately proved by testimony in this record and I find the point irrelevant.

22. Concerning this same situation in another case, the Court of Appeals for the District of Columbia Circuit, in *N.L.R.B.* v. *Preston Products Company*, ____ F. 2d ____ (November 14, 1967; 66 LRRM 2548, 2552) wrote:

> . . . we have here the classic case of employees testifying under the eye of the company officials about events which occurred almost a year before and prior to the activities which were subsequently found to constitute unfair labor practices. It is certainly conceivable that those same threats and benefits which shook an employee's original support for the union also altered that employee's memory as to events which occurred before the presentation of such threats and benefits.[2] . . .
>
> 2. Indeed, 10 of the 13 employees relied upon by the company had received not one but two pay increases during the "campaign" period. Surely the Board might well conclude that in the real world employer blandishments and coercion amounting to unfair labor practices during an election campaign can result in tailored testimony.

manage to testify accurately regardless of possible consequences, there are many others who, although perhaps trying and hoping to tell the truth, are involuntarily influenced by considerations of more immediate interest. And there are, of course, others.

Russel Sims, Arel Rodgers, Dwayne Johnson and *John Harris*: These men were the nucleus of the organizing effort at KRH, and they signed cards during their meeting with Union Representative Patton on June 22. There can be no doubt that they understood the simple language of the authorization card and there is no evidence of any statement made to them which could impair the validity of these cards as designations of the Union by these employees. I find them, therefore, valid.

Tom Garrett: Russel Sims testified that, on the evening of June 22, he gave blank cards to Garrett and John Wakulich, junior operators then on the shift with him: that Garrett filled one out, except for the date, and signed it and that he, Sims, put in the date. Garrett did not testify but Wakulich, who was called on behalf of Respondent, corroborated Sim's testimony that he and Garret were given cards by Sims at the same time. Wakulich was not questioned by Respondent's counsel concerning any statement by Sims relating to the purpose of the cards. Accordingly, there is no evidence to nullify the effect of Garrett's undisputed signature on the card and I find it to be a valid designation of the Union as his representative.

William Sloan testified that he was given a card by Dwayne Johnston; that he read it and signed it; that the date, 6/23/66, is in his handwriting. On cross-examination, he testified that he was told that the purpose of signing the card was "To petition the Union for an election for representation at the plant" but Respondent's counsel made no effort to have him clarify this ambiguous state-

ment. In view of the clear language of the card and Sloan's testimony that he read it, I find that this statement is not sufficient to show that Sloan signed the card on the representation that it was solely for the purpose of obtaining an election.[23] Accordingly, it constitutes a valid designation of the Union on his behalf.

John Wakulich: As noted above, Wakulich was given a card by Sims at the same time as Garrett and he was not questioned about any statement concerning its purpose. Wakulich, while he denied that the June 23 date on his card was inserted by him or that he signed it on that date, did not dispute Sims' testimony that he gave cards to Wakulich and Garrett on June 22. Wakulich testified that he read the card, filled in his name and address, signed it and returned it to Sims within 4 days after he received it. Accordingly, I find the card to be a valid and timely designation of the Union as Wakulich's representative.

Thomas B. Lynch: Union Representatives Patton and Williams both testified that on June 22, the evening of the meeting, they went to Lynch's home and that he then and there signed the authorization card. Lynch's testimony was conflicting: He first testified that Patton told him the card was for an election but he admitted that he could read and that he "glanced at" the card as he signed it. The card itself, however, shows that Lynch carefully filled in all the blanks, except the date, and that he signed it. After reading his own pre-trial statement, Lynch testified that Patton told him the purpose of the card was to obtain Union representation of the employees; that his testimony about reference to an election was based solely upon his own ideas out of his years of experience as a union member, and that Patton made no reference to an

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23. *Furr's, Inc.* v. *N.L.R.B.*, 381 F. 2d 562 (C.A.10; 1967), cert. denied October 9, 1967; enforcing 157 NLRB 387.

election. Accordingly, I find the card to be a valid designation of the Union by Lynch.

Harry L. Harms: Union Representative Williams testified that on June 23 he handed Harms an authorization card; that he asked Harms to read and sign it and that Harms did so. Harms was not called as a witness, although the record shows that he is still in Respondent's employ and that he holds a newly-created (in December 1966) supervisory position. There is no evidence impairing the validity of this card and I find it a valid authorization of the Union as of June 23.

Don Foose: Williams testified that, also, on June 23, he gave a card to Don Foose, who signed and returned it to him. The record shows that Foose is still in Respondent's employ but he was not called as a witness. Accordingly, there is no evidence to impair the validity of this card and I find it to be Foose's designation of the Union as his representative.

Dean Tittel testified that, on June 23, he was given an authorization card by Dwayne Johnson; that he read the card, found it self-explanatory, filled it in, and signed it. Although he testified that Johnson said something about the possibility of using it to file a petition for an election, this vague reference to the possibility of so using the card does not, I find, impair its effectiveness as Tittel's designation of the Union as his representative and it is valid for that purpose.

Gerald Julian: According to Sims, he visited Julian at his farm early in the morning on June 23 and handed him a blank authorization card: Julian filled it in, signed it and returned it to him. Julian admitted having filled in his address and having signed the card but testified that Sims told him it was "an inquiry pertaining to the Union." He testified that, although he filled in the card, he did not

read it. He also admitted that Sims was with him from 5 to 10 minutes. On the basis of the witness' evasiveness and his demeanor while testifying, I reject his testimony that Sims told him that the card was for the limited purpose of an "inquiry." His purported ignorance of the purpose of the card was belied when he stated, on cross-examination, that he did not think it was "a union card." I find that he read and signed the card; that he understood its purport and that it constitutes a valid designation of the Union as his representative.

Russell M. Bishop testified that on June 23 he was given a card by Arel Rodgers, who told him that its purpose was to let the Union know what interest there was in Union representation at the plant and, if a majority were "interested," the Union could represent the employees. He also testified that he read it before he signed it. No serious question can be raised concerning the adequacy of this card as Bishop's designation of the Union and I find it a valid designation.

W. L. Roberts testified that, on June 27, Sims gave him an authorization card; that he read the card, inserted his name and post office box number, and that he signed it. All he could recall that Sims said to him was that they wanted to get the cards in that day. I find that this card constitutes a valid designation of the Union by this employee.

Jack E. Durbin testified that he obtained the authorization card when Sims laid it on his bench, saying that it was a "union card"; that he kept it for 2 days and that, when Sims asked him to sign the card because he needed to get the cards in, he filled it in and signed it, without reading "the fine print," and handed it to Sims. Durbin also testified that he knew what the card was and that he had been "in the union" for 8 or 10 years. There is no

serious question about the validity of the card as Durbin's designation of the Union and I find it to be valid for that purpose.

Ronald Weinman testified that he received an authorization card from Sims at the plant; that Sims said that signing it would not obligate him, as far as the Union was concerned, but that it was "just a recognition of the union." He testified that he filled in the date—July 2—and all the other blanks on the card, that he "presumed" he read it, and that he signed it and returned it to Sims. There is no evidence that Weinman was in any way misled into signing the card and Respondent's offer of proof concerning the witness' understanding of the meaning of "recognize" was rejected.[24] Accordingly, I find that Weinman validly designated the Union as his representative.

William F. Pickerill testified that he received a union card from Sims; that he dated it July 2, printed his name in the appropriate space and then signed it. Sims testified that Pickerill then returned it to him. Pickerill also testified that Sims said they would not have to join the Union and that, if the cards were signed, the Union would send out a man "to talk" to them. Pickerill, although he testified that he did not read the card before signing it, admitted that cards were being handed around in the control room; that "there were no secrets"; that Rodgers "may have" offered him the same cards several days earlier and that he did not sign it then because he was "deliberating." Upon all of the testimony of this witness, and his demeanor while testifying,[25] I find that he did read the card, that he had not been misled concerning its purpose, and

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24. See *Cumberland Shoe Corp.*, 351 F. 2d 917 (C.A. 6; 1965) and cases cited; *Furr's, Inc.*, 381 F. 2d 562 (C.A. 10; 1967).

25. At the time of the hearing, Pickerill had been promoted to senior operator.

that the card constitutes a valid designation of the Union as his representative.

Jimmie Ham: Sims testified that he gave a card to Ham on June 30; that Ham signed it and returned it to him. Ham testified that Sims, when he gave him the cards, said that it was to entitle him, Ham, to vote in an election should there be one; that Sims said that 87 percent of the men had signed cards and asked him whether he would sign one. He also testified that he signed it without reading it. Ham, a senior operator, admitted that he and Sims had talked about the value of the Union in protecting the men and getting fringe benefits, such as a retirement policy, and that, at the end of their talk, he signed the card. When asked whether there was talk about having the Union represent the men, Ham said he could not recall any. On the basis of his entire testimony, and his demeanor while testifying, I find that Ham read and understood the card; that he signed it on July 2;[26] that Sims did not restrict its purpose to the holding of an election and that the card constitutes a valid designation of the Union on Ham's behalf.

It is to be noted that the cards of Weinman, Pickerill and Ham were the only ones signed on July 2, and it was stipulated that the Union's request for bargaining was received by Respondent on June 30 or July 1. Even without these three cards, therefore, the Union represented 15 employees out of the 22 in the unit, a clear majority, when it sent its demand for recognition. Before Respondent had formulated its rejection of the demand and voiced its doubt that the Union represented a majority, these three em-

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26. This makes it probable that the others had all previously signed: 17 out of 22, so that the percentage of those who had signed was over 77—and Sims' statement was only minor "puffing."

ployees had validly designated the Union as their representative. There is nothing in the record indicating that the Union had abandoned its demand prior to July 2,[27] and there is nothing in the record that would make it unfair to Respondent to consider the demand as continuing for a few days after its receipt by Respondent. Accordingly, the Union's demand is regarded as continuing, at least until Respondent's refusal.[28] Upon all the foregoing facts, I find that the Union's demand for recognition was based upon valid designations from 18 of the 22 employees in the unit, and that it represented a majority.

C. *Respondent's "good faith doubt"*

In rejecting the Union's request for recognition, Respondent justified its position in the following words:

> In view of your Petition and the fact that we do not believe that a majority of our employees in the proper bargaining unit are in favor of the union, we will proceed to handle this matter through an election conducted by the National Labor Relations Board.

Respondent maintained this position at all times thereafter and the representation case proceeded step by step solely on the initiative provided by the Act and the Board's regulations. A hearing was noticed and held, the Regional Director's Decision issued and, after the intermediate appeal, the election was set for September 28. At no time, before or after its refusal to bargain, did Respondent make

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27. The filing of the representation case petition does not constitute such abandonment. (*American Compressed Steel Corp.*, 146 NLRB 1463, 1470-71, enforced on this point, 343 F. 2d 307 (C.A. D.C., 1965); *Galloway Manufacturing Corp.*, 136 NLRB 405, 409; enfd. 312 F. 2d 322 (C.A. 5, 1963).

28. *Henry Colder Company*, 163 NLRB No. 13; *American Compressed Steel Corp., supra; Consolidated Rendering Company*, 161 NLRB No. 3.

an effort to discover whether the KRH employees had actually designated the Union as their representative. The representation case shows no consent by Respondent that would facilitate the holding of an election. Respondent's right thus to "stand mute," if he desired—or was advised—to do so, is not questioned.[29] His doing so, however, must be cast into the balance, along with the other evidence, in determining whether there existed the "good faith doubt" he now claims to have concerning the Union's status as the collective-bargaining representative of his employees.

The refusal to bargain appears to be based on three grounds: (i) the Union's filing of a petition; (ii) doubt that the employees involved constitute "the proper bargaining unit;" (iii) doubt that the Union had been designated by a majority.

(i) Respondent's reliance upon the Union's filing of a representation petition is misplaced. The Board has repeatedly held that the filing of a petition does not, in itself, suspend an employer's bargaining obligation, absent other evidence of a good-faith doubt.[30]

(ii) Although Respondent's letter of refusal makes reference to "the proper bargaining unit," there is nothing in the record to indicate that this reference was any more than the effort of prudent counsel to retain all possible de-

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29. Insofar as his position of intransigence, however, is based upon an insistence upon an election, Respondent is in error. It is well settled that an employer does not have an absolute right to a Board-conducted election. (*N.L.R.B.* v. *Trimfit of California*, 211 F. 2d 206 [C.A. 9; 1954]; *N.L.R.B.* v. *Philamon Laboratories, Inc.*, 298 F. 2d 176 [C.A. 2; 1962]; *Snow & Sons* v. *N.L.R.B.*, 308 F. 2d 687 [C.A. 9; 1962]).

30. *Crown Tar and Chemical Works, Inc.*, 154 NLRB 562, 567, enf'd. 365 F. 2d 588 (C.A. 10; 1966); *N.L.R.B.* v. *Glasgow Co.*, 356 F. 2d 476, 479 (C.A. 7; 1966); *Galloway Manufacturing Corp., supra; Laabs, Inc.*, 128 NLRB 374; *Midwestern Mfg. Co. Inc.*, 158 NLRB 1698.

fenses should litigation ensue. So far as this record is concerned, the status of the senior operators as supervisors and, therefore, excluded from the unit, had never occurred to Respondent prior to the hearing in the representation case.[31] Moreover, it has repeatedly been held, an employer's decision to refuse to bargain, on the ground that the designated unit is not an appropriate one for the purpose, is taken at the peril of the employer.[32] Accordingly, it having been determined that the unit involved *is* an appropriate one for collective-bargaining purposes, Respondent's doubt thereof—even if held in good faith—is no justification for his refusal to bargain with the Union.

(iii) We come now to the most difficult of the three reasons set forth by Respondent for his initial refusal to bargain with the Union—his claim of a "good-faith doubt" that the Union was the designated bargaining representative of a majority of the employees. It is settled law that, in determining whether an employer's refusal to bargain, with a union having no history of contract or certification, was based upon a good-faith doubt concerning the Union's representation of a majority of the employees involved, the burden of proof is on the General Counsel.[33] This burden of proof, however, does not exist in a vacuum: Respondent's letter refusing to bargain stated that he did "not

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31. I do not overlook the implications of the references to the senior operators in the orders and bulletins discussed in the Preliminary Decision but I am convinced that, if Respondent had intended to raise this point at the time of his refusal to bargain, he would have said so clearly.

32. *Bardahl Oil Company*, 163 NLRB No. 32; *United Aircraft Corporation* v. *N.L.R.B.*, 333 F. 2d 819, 833, cert. denied 380 U.S. 910; *Florence Printing Co.* v. *N.L.R.B.*, 333 F. 2d 289 (C.A. 4).

33. *Aaron Bros. Co.*, 158 NLRB No. 108; *Hercules Packing Corp.*, 163 NLRB No. 35; *H & W Construction Co., Inc.*, 161 NLRB No. 77.

believe that a majority . . . are in favor of the union . . ." and there is nothing more in the record than this statement. As the court of appeals wrote, in *N.L.R.B.* v. *C. J. Glasgow Co.*, 356 F. 2d 476, 479 (C.A. 7; 1966):

> To be "fair" or in "good faith" doubt must have a rational basis in fact. *N.L.R.B.* v. *John S. Swift Co.*, 7 Cir., 302 F. 2d 343, 346. Here there is no evidence of probative value to justify a good faith doubt. In addition to its failure to reveal any reason for their "belief" the record discloses no action upon the part of Glasgow, Leone, or any other representative of the Company, to attempt to verify the Union's claim, either through inquiry addressed to the Union or to the employees.

But the Board's rule, placing the burden of proof on the General Counsel, also states that the decision on this point is to be reached on the basis of *all* the relevant evidence. Included in the evidence that may be considered is evidence of later conduct and statements which serve to cast light upon the motivation of earlier acts. Prominent, of course, are the statements of Respondent which have been found herein to constitute restraint and coercion of employees in their exercise of rights of self-organization. While the first of these incidents did not occur until July 28,[34] more than 3 weeks after Respondent dispatched his letter refusing to bargain, and the others occurred in August and September, this delay alone, in the context of this case, is not decisive.[35] Angle was a very busy man, engaged in many enterprises from his main office in Wichita, and the situation at KRH may not have

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34. This date has particular importance in that Angle testified that it was just prior to this date that he learned, from a source he considered reliable, that all of the KRH employees except one had signed union cards.

35. See: *Bernel Foam Products Co., Inc.*, 146 NLRB 1277, 1283-4.

seemed to him to be critical—until he was notified that specific things were about to happen. Thus, notice that a hearing would be held in the representation case was mailed from the Regional Office on July 15 and received by Respondent's counsel on the 18th; he was reliably informed shortly thereafter that all but one of the plant employees had signed up; and the dinner at which Angle spoke to some of the plant employees was held on July 28. The Regional Director's Decision of August 25, implemented on September 9 by the setting of September 28 as the date for the election, was closely followed by the elaborate series of interviews which Angle conducted with his employees beginning on September 13.

In addition to the July 28 speech and the mid-September interviews, both found in the Preliminary Decision to have been violative of Section 8(a)(1) of the Act, the record also contains evidence of relevant conversations which Angle had with Sims on August 10 and with Bishop on August 17, which are not dealt with as violations of that section because they are not fairly encompassed within the allegations of the complaint. As stated above, however, these incidents require consideration in determining Respondent's motivation in refusing to bargain with the Union.

Sims testified that, a day or two after the Board hearing on August 9, Angle called him at home, late in the evening, and they had a conversation lasting between an hour and an hour and a half. Angle said, according to Sims, that he had "just found out" that there was a serious trouble at the plant based upon dissatisfaction among the men; that he, Sims, agreed, and that Angle then talked at some length about his experiences growing up and starting in business; that Angle asked him whether he had signed a union card and that, when he said he had, asked

him whether he had handed some out, which he denied. Angle also asked Sims whether he knew much about union procedure and, when Sims said he did not know much, Angle said he did not either but was "studying it quite a lot now." Angle then asked him, Sims testified, whether he knew that if 11 men in a unit of 21 voted for a union, they would tell the others "what to do" and asked Sims whether he thought that was "democratic." Answering his own question, according to Sims, Angle then said he did not think there was anything to be democratic about; then he was going to run the plant and that nobody was going to tell him what to do.

Angle admitted having had a long telephone conversation with Sims at about this time and stated that Sims reminded him that it had been indicated to him by American Messer, when he was hired, that when the American Messer plant manager, Wilson, left Kansas Refined Helium, he, Sims, might be considered for the job. Angle also recalled that Sims told him of his experience while employed at Victors Refining Company when a new plant manager came in who, Sims said, was "mentally unstable" and "acted like he was God."[36] Angle, however, did not contradict Sims' account of their conversation and I find that it occurred as described by Sims.

Russell L. Bishop testified that on the evening of August 17, in the control room of the plant, Angle engaged him in conversation about the Union. Angle said, according to Bishop, that the employees would not have a chance to vote for at least a year and that during that year's time "he would get rid of the people that were instigating" the

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36. The use of these phrases by Sims in this conversation, Angle testified, helped him decide, at his interview with Sims on September 13, that Sims had written the first of the anonymous letters discussed in the Preliminary Decision.

Union and that they would probably never get a chance to vote. Bishop testified that this conversation was in the presence of Corey Call, another junior operator, and that, although there were several other employees in the control room because there had been a buffet dinner and "open house" in the plant, Call was the only person who could have overheard the conversation. Angle admitted that he made brief visits to the plant in July and August and he did not contradict Bishop's testimony. Corey Call, although the record shows that he was still in Respondent's employ at the time of the hearing, was not called to testify. Accordingly, I find that Angle made the statements as testified to by Bishop.

On the basis of these statements by Angle, of the other statements found in the Preliminary Decision to constitute interference with, restraint and coercion of his employees in their exercise of their rights of self-organization, and of his conduct in discriminatorily discharging six employees on September 20, I find that Respondent did not, when he refused to bargain with the Union on July 6, have a good-faith doubt concerning its representation of a majority of the employees in the designated unit, but that his refusal was based upon a desire to gain time to dissipate and destroy the Union's status as the collective-bargaining representative of those employees.

This conduct by Respondent, therefore, was violative of Section 8(a)(5) of the Act.[37]

The unilateral wage increases granted by Respondent on September 21, described in the Preliminary Decision and therein found to have constituted interference with the employees' rights of self-organization, were granted at a

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37. *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 185 F. 2d 232 (C.A. D.C. 1950) cert. den. 341 U.S. 914.

time, it has herein been found, when the Union was the collective-bargaining representative of the employees at the plant and when Respondent was, therefore, under a duty to bargain with the Union concerning such matters. Accordingly, this conduct also constituted a refusal to bargain violative of Section 8(a)(5) of the Act.[38]

V. The Effect of the Unfair Labor Practices upon Commerce

The activities of Respondent set forth in section III, occurring in connection with its operations described in section I, have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. The Remedy

Having found in this Supplemental Decision that Respondent has engaged and is engaging in additional unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action, including the posting of an appropriate notice, to effectuate the policies of the Act.

Having found the Union was the designated representative of Respondent's employees in an appropriate unit on July 2, 1966, and that Respondent, by refusing to bargain with it and by engaging in unfair labor practices aimed at destroying its majority, discloses a disposition to evade his obligation to bargain, it is found that a simple cease-and-desist order would not prevent Respondent from profiting from his unlawful conduct and that only a bargaining order can restore, as nearly as possible, the situation which would

38. *N.L.R.B.* v. *Katz*, 369 U.S. 736.

have obtained but for Respondent's unfair labor practices.[39] Accordingly, it will be recommended that Respondent bargain with the Union as the collective-bargaining representative of his employees in the indicated appropriate unit and, if an agreement is reached, embody such agreement in a signed contract.

Having found that Respondent altered the terms and conditions of employment of his employees without bargaining in good faith with the Union concerning such changes at a time when the Union was the designated collective-bargaining representative of his employees, it will be recommended that he cease and desist from any repetition thereof.

Upon the basis of the foregoing Supplemental Findings of Fact and upon the entire record in this case, I reach the following

Supplemental Conclusions of Law

The Conclusion of Law numbered "5" in the Preliminary Decision herein is hereby renumbered "7," and the following conclusions inserted immediately after the Conclusion of Law numbered "4":

5. On July 1, 1966, and thereafter the Union was and is the exclusive representative for collective-bargaining purposes of Respondent's employees in the unit described as follows:

All production and maintenance employees at the Respondent's plant, including instrument men and plant-

39. *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177; *D. H. Holmes Co.* v. *N.L.R.B.*, 179 F. 2d 876, 879-880 (C.A. 5; 1950); *Piasecki Aircraft Corp.* v. *N.L.R.B.*, 280 F. 2d 575, 591-592 (C.A. 3; 1960), cert. denied 364 U.S. 933; *N.L.R.B.* v. *Delight Bakery, Inc.*, 353 F. 2d 344, 347 (C.A. 6; 1965); *Flomatic Corp.*, 147 NLRB 1304, 1307.

clerical employees, but EXCLUDING office-clerical employees, casual and temporary employees, professional employees, guards, and supervisors within the meaning of the Act; and, employees of other operations of George A. Angle

which was and is a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act;

6. By refusing, on and after July 1, 1966, to bargain in good faith with the Union and, on or about September 21, 196 by changing the terms and conditions of employment of his employees without bargaining in good faith with the Union concerning such changes, Respondent has refused to bargain collectively with the representative of his employees and has committed unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act.

SUPPLEMENTAL RECOMMENDED ORDER

Upon the basis of the above Supplemental findings of fact and Supplemental conclusions of law, and upon the entire record in this case, it is recommended that George A. Angle, doing business as Kansas Refined Helium Company, his agents, successors, and assigns, shall, in addition to the recommendations set forth in the Recommended Order attached to the Preliminary Decision herein:

1. Cease and desist from:

(a) Refusing to bargain collectively with Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the representative of his employees in the appropriate unit described in the Supplemental Conclusion of Law numbered "5";

(b) Changing the terms and conditions of employment of the employees in said unit without bargaining

concerning such changes with the said Union; *Provided,* however, that nothing herein shall be construed to require Respondent to cancel or withdraw any benefit heretofore granted such employees.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Upon request, recognize and bargain collectively with Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive representative of the employees in the appropriate unit set forth in the Supplemental Conclusions of Law above;

(b) Post at his plant at Otis, Kansas, copies of the notice attached hereto and marked Appendix "B."[40] Copies of said notice, to be furnished by the Regional Director for the Seventeenth Region, shall, after being signed by him, be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

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40. If these Recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of the United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

(c) Notify the Regional Director for the Seventeenth Region, in writing, within 20 days from receipt of this Decision, what steps he has taken to comply herewith.[41]

Dated at Washington, D. C.

/s/ Sidney D. Goldberg
Sidney D. Goldberg
Trial Examiner

APPENDIX B

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE SUPPLEMENTAL RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

I HEREBY NOTIFY MY EMPLOYEES AT THE KANSAS REFINED HELIUM COMPANY PLANT THAT:

I WILL, upon request, bargain in good faith with OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, as the exclusive collective-bargaining representative of my employees in the unit described as follows:

All production and maintenance workers at the KANSAS REFINED HELIUM plant, including instrument men and plant-clerical employees, but excluding office-clerical employees, casual and temporary employees, professional employees, guards, and supervisors within the meaning of the Act, and employees of other operations of George A. Angle,

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41. In the event that these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Seventeenth Region, in writing, within 10 days from the date of this order, what steps he has taken to comply herewith."

and, if an agreement is reached, will embody that agreement in a signed contract.

I WILL NOT change the terms and conditions of employment of any of my employees in the above-described unit without bargaining in good faith with the said union concerning such changes: *but* nothing in the Recommended Order requires that any benefits heretofore conferred on any employee in said unit shall be withdrawn.

All my employees are free to become and remain, or to refrain from becoming or remaining, members of OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, or any other labor organization.

GEORGE A. ANGLE, doing business as KANSAS REFINED HELIUM COMPANY

(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 610 Federal Building, 601 East 12th Street, Kansas City, Missouri 64106 (Tel. No. FR 4-5181).

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

GEORGE A. ANGLE, doing business as KANSAS REFINED HELIUM COMPANY,
Respondent

and

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,
Charging Party

Cases 17-CA-3021

17-CA-3021-2

Gerald A. Wacknov, Esq., for the General Counsel.
Patrick F. Kelly, Esq., of Wichita, Kans. (*Frank and Kelly*), and *Joseph A. Lynch, Jr., Esq.*, of Kansas City, Kans., for the Charging Party.

Marvin J. Martin, Esq. (*Martin, Wooley and Churchill*), and *Robert Martin, Esq.* (*Martin, Porter, Pringle, Schell and Fair*), of Wichita, Kans., for the Respondent.

Robert N. Partridge, Esq. (*Foulston, Siefkin, Powers, Smith and Eberhardt*), of Wichita, Kans., for the witness Thomas E. Garrett.

TRIAL EXAMINER'S DECISION AND REPORT

SIDNEY D. GOLDBERG, Trial Examiner: The question for decision at this time is whether Thomas E. Garrett, whose testimony the Board has directed me to take herein, is physically able to testify. I find that he is not.

1. History of the case

This proceeding, commenced by the issuance of a complaint alleging that George A. Angle, doing business as Kansas Refined Helium Company, had violated Section 8(a)(1), (3), and (5) of the Act, came on for trial before me in Great Bend, Kansas, January 18-20, 1967, immediately following the trial, before the United States District Court for the District of Kansas, at Wichita, of an application for ancillary injunctive relief under Section 10(j) of the Act. Garrett, who is one of the employees alleged to have been dismissed in violation of Section 8(a)(3) of the Act, testified before the court but did not testify before me. Respondent made no particular point during the trial before me concerning Garrett's failure to testify and made no effort to call him as a defense witness.

On February 14, 1967, Respondent filed a motion "to reopen record and for additional hearing." The motion stated that, on January 21, Respondent's counsel, Marvin Martin, together with one of his associates, Stanley Churchill, and Patrick Kelly, attorney for the charging Union, had conducted an interview with Garrett, which was recorded, and a transcript of the recording was attached to the motion.

The motion stated that the recording shows that some of the testimony given by Garrett and others before the United States District Court in the injunction proceeding was false and it argued that the giving of such false testimony by Garrett might justify the Board in denying his reinstatement. It also stated that Garrett's testimony concerning the status of senior operators, in a deposition taken in connection with the injunction proceeding, was incorrect and that Garrett could give additional evidence on that point. Accordingly, the motion requested that the record be reopened for additional hearing on those matters.

By order dated March 8, 1967, I denied the motion, pointing out that a motion to reopen, made to the United States District Court,[1] was still undetermined and that the court was the proper forum, at least initially, for the relief requested. The order also noted that Garrett's statements, in the transcript of the interview, were vague and inconclusive on the authority of the senior operators, that the evidence on this subject was not newly discovered, so that Respondent could have called Garrett as a witness and, finally, that Garrett's testimony on this subject would be cumulative.[2]

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1. That motion was based upon the same transcript of the recorded interview submitted to me.

2. On April 5, 1967, Judge Brown rendered his decision granting the application for an injunction. He disposed of Respondent's motion to reopen the record in the following passage:

> Since the hearing in this case, respondent filed a motion to reopen the record and to renew discovery proceedings concerning depositions from Garret and Sims, and such other persons as should appear necessary. In support of the motion, respondent offers a transcription of a conversation of the witness Tom Garret with Mr. Martin, attorney for respondent, and Mr. Kelly, attorney for the Union. Garret apparently requested the interview to correct statements in his testimony which he felt, upon reflection, were not true. We have examined that transcription and Garret's testimony at the hearing. We find no variances which are material to our decision to grant injunctive relief. Garret stated in the interview that he did not know who wrote any of the anonymous letters. He did make certain statements which tend to discredit the testimony of Sims concerning those letters. Much emphasis has been placed on these letters, more, we think, than they deserve. They contained no threats against any persons or against property of the respondent. They were not distributed by the anonymous writer at large throughout the plant, but mailed only to Angle. The writer (or writers) criticized management personnel at the plant. There was no personal criticism or abuse of Angle himself. The letters purported only to advise Angle of a difficult situation at the plant created by certain of his supervisory personnel. The letters reflect no attempt to create strife or discontent among the men, nor were they so used. If anything, they were merely symptomatic of such unrest.

My Preliminary Decision, which dealt with the allegations of interference and unlawful discharge, was issued September 12, 1967; it found that the senior operators were not supervisory employees and that Garrett, among others, had been unlawfully discharged.

Respondent filed exceptions to the Preliminary Decision, specifically excepting to the order of March 8, 1967, which denied the motion to reopen the record. The brief submitted to the Board in support of the exceptions states that "Garrett failed to appear for trial" and argues that this alone "is sufficient for a presumption against him." The argument nevertheless continues by stating that Garrett should also be denied reinstatement by reason of his "activity" in the injunction proceeding, which is particularized as having "spoke[n] as [a] witness for the Board in the prosecution case."[3]

By order dated January 30, 1968, the Board stated that:

> . . . having duly considered the Respondent's exceptions and brief, and the entire record in the case, is of the opinion that Respondent's exceptions to the Trial Examiner's denial of its motion to reopen and remand has merit. Accordingly,
>
> IT IS HEREBY ORDERED that the record herein be reopened and the case remanded to the Trial Ex-

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The motion to reopen is denied.
The petitioner is entitled to injunctive relief.

The Court of Appeals for the Tenth Circuit affirmed Judge Brown's order on August 28, 1967, with modifications only as to employees Sims and Rodgers (382 F.2d 655).

3. Presumably in deference to the District Court decision granting the injunction, and the affirmance thereof by the Court of Appeals on August 28, 1967, the brief, which was filed October 20, 1967, goes no further than to state that Garrett, in his recorded interview "spoke of 'perjury' and a 'direct lie.' "

aminer for the purpose of taking Garrett's testimony, as it bears on the substantive issues and issues of credibility in the case, and such other evidence as may be offered by the General Counsel and Charging Party in rebuttal thereof.

2. Efforts to obtain Garrett's testimony

The first effort to set a hearing pursuant to the Board's order was the suggestion of the date March 21 by the General Counsel. This date was not convenient for Respondent's counsel and, by order of March 22, 1968, I directed that a hearing be held on April 24, 1968.

On April 24 the matter was called for hearing before me in Wichita, Kansas. The General Counsel, the Charging Party, and the Respondent were all represented. While Garrett was said to be personally present, he was represented by counsel who reported that he had talked with Garrett's personal physician; that the physician had informed him[4] that Garrett was recognized as an "emotionally unstable person," and that for him to take the witness stand might be harmful to his health, "destroying" him and his usefulness to his family. After discussion among counsel, it was agreed that Garrett would submit to psychiatric examination in the near future, May 4 to 7 was suggested, with the possibility of a report about May 15. Respondent's counsel stated that, if they had the psychiatric report about that date, they could study it, consult with the examining psychiatrist if necessary, and then determine the course they wished to pursue. Accordingly, I continued the hearing to June 11, 1968, with a direction that copies of the psychiatric report on Garrett be transmitted, as soon as completed, to all counsel in the case.

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4. Respondent's counsel withheld any objection to counsel's statements concerning this conversation.

On June 6, a motion was filed on behalf of Garrett, stating that he had been under hospitalization for treatment and psychiatric evaluation, and that a negative report on his condition was expected in the near future. Pending receipt of this report, application was made for a continuance of the hearing. Respondent interposed no objection and the hearing was continued to July 30.

The report of the examining psychiatrist, Austin J. Adams, M.D., was distributed to all counsel about June 17. It concluded, on the basis of Garrett's history and the psychological tests which had been given, that Garrett suffered from:

> . . . a rather severe characterological disturbance of long duration . . . in which there is disorganization of the thinking process manifested by hallucinations and delusions that preclude discernment of what is real and what is fantasy.

Dr. Adams also stated that, in his opinion, the stress of a court appearance would aggravate Garrett's illness, which had subsided somewhat since his hospitalization.

On the basis of the psychiatric report, the General Counsel moved, on July 2, that the hearing be ordered closed and the case transferred to the Board, Garrett, through counsel, joined in the request. Respondent opposed these motions, pointing out that another psychiatric examination of Garrett had been ordered by the United States District Court[5] and Respondent requested that the

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5. This examination was ordered by the court in connection with Respondent's motion, filed June 14, for modification of the injunction to relieve Respondent from obedience to its provision requiring employment of Garrett. It appears from the record herein that the Respondent suggested, and the court appointed, Dr. C. J. Kurth as the examining psychiatrist; that Dr. Kurth, as well as Dr. Adams, testified before the court on August 30 concerning Garrett's ability to perform his duties at Respondent's plant and that the motion was denied.

hearing be conducted as scheduled to take evidence from both psychiatrists, as well as to subject their testimony to cross-examination. Accordingly, by order dated July 26, I denied the motions to close the hearing and directed that it be resumed on September 10, 1968 that Garrett appear and testify if able to do so; and that, if he should be unable to testify, witnesses be produced to testify concerning his condition.

3. The evidence concerning Garrett's condition

The hearing resumed on September 10 before me at Wichita, Kansas, with all parties, and Garrett, represented by counsel.[6] Garrett's counsel stated that, as noted at the April 24 hearing, Garrett's work schedule called for a 4-day layoff from May 4 through 7, and that arrangements had been made for his examination during that period; but that Garrett did not report for examination as scheduled; that, however, he was located several days later at a State hospital, confused and distressed; that he was transferred to another hospital and to the care of the family-chosen psychiatrist, Dr. Austin J. Adams, who examined and treated him.

Dr. Adams[7] confirmed counsel's statement that Garrett had not reported for examination as scheduled; that he

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6. In addition to the testimony of witnesses and statements of counsel in the sessions before me (the transcript of which has been corrected by order dated December 15, 1968), I have drawn on the official record of the proceedings ancillary to this case in the District Court and the Court of Appeals, of which I take official notice.

7. Dr. Adams' qualifications were not questioned. He testified that he had been a practicing physician since 1937; that he had trained for 2 years as a resident in psychiatry at the Menninger Clinic; that he had further training in psychiatry at the National Naval Medical Center; that he had practiced as a psychiatrist in the United States Navy; and that he was engaged in practice, as a specialist in psychiatry, in Wichita.

found him in the State hospital where he had been for 2 or 3 days; that on May 11 he transferred him to another hospital and kept him under his own care and examination until June 4. After that date, he released Garrett from the hospital but continued to see him at his office until July 11.

When he began his examination of Garrett in May, Dr. Adams testified, he found him tense and anxious, feeling that he was being watched and, at least symbolically, threatened with hanging; he was concerned about his having testified in court and he was uncertain whether he had acted correctly. Dr. Adams continued to test and treat him, diagnosing his illness as a condition of "schizophrenia reaction" of "paranoid type." He also concluded that the aggravated state of Garrett's illness was due to his involvement in the litigation and his concern over whether he had testified truthfully or "injured" anyone.

At the completion of the course of treatment in the hospital, Dr. Adams testified, Garrett's symptons had subsided sufficiently so that, considering his own safety and the safety of others, he could be released from the hospital. Dr. Adams stated, however, that he did not consider Garrett as "cured" but only in a "social remission"; i.e., with the problem latent and a flare-up possible.

Dr. Adams testified that he felt that the prospect of testifying was "a precipitating factor" in the condition of illness he found in Garrett and that, in his opinion, if Garrett were required to testify,

> . . . the possibility of precipitating a return of the illness would be so great that I would state that I felt he should not testify.

Dr. Adams also testified that Garrett was able to work and that engagement in his normal routine would have a thera-

peutic effect because he liked his work[8] and because the performance of his duties at the plant was not a factor contributing to his condition.

Dr. Adams testified that, in his professional opinion, for Garrett to maintain the emotional stability he had attained, it would be necessary for him to continue to take the prescribed medication and to remain under observation. Under those conditions and without any unsettling influences, he felt the chances of Garrett having a recurrence would be reduced to a minimum. If, however, he should be required to testify in this case, Dr. Adams gave it as his opinion that there would be great danger of his falling into another similar condition, in the throes of which his memory would be blocked or distorted and he would be unable to distinguish between fact and fantasy.[9]

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8. Garrett had been reinstated, pursuant to the injunction, on August 14, 1967, and, at the April 24, 1968, hearing in this case, Respondent's counsel stated that his performance was satisfactory. Garrett continued to perform his duties through May 2 but, when he reported for duty on June 10, some days after his release from the hospital, the plant manager refused to permit him to go to work, stating that his "reinstatement" was a matter to be handled by the attorneys for the parties. On June 14, Respondent filed the motion for modification of the injunction referred to above. At the close of the hearing on August 30, Judge Brown denied the motion and Garrett was restored to duty September 7. He was still at work on September 14 when the hearing in this matter was completed.

9. Respondent's counsel, during his cross-examination of Dr. Adams, called for a report made by Dr. Adams to Garrett's attorney. It was produced and examined by Respondent's counsel who, although specifically invited to make it part of the record, did not do so. I infer, therefore, that this report is consistent with Dr. Adams' testimony.

Respondent called as a witness Dr. C. J. Kurth, the psychiatrist he had suggested to the District Court in connection with the motion to modify the injunction.[10]

Dr. Kurth testified that he saw Garrett once, when he examined him on July 15, 1968; that the examination included psychological tests; that he took a history from Garrett which disclosed previous treatment for a similar condition in 1963; and that he examined the records of Garrett's 1963 hospitalization. He concluded that Garrett's personality was schizophrenic but stated that, at the time of the examination, Garrett was functioning in the "mid-high-average I.Q. range" and was not in a "psychotic state." Accordingly, in Dr. Kurth's opinion, Garrett would have been capable of testifying at that time.

On cross-examination, however, Dr. Kurth conceded that placing Garrett on the witness stand could break down the "adjustment" he had shown during the examination and precipitate a "psychotic episode." Moreover, Dr. Kurth's report to Garrett's counsel, dated July 31, 1968, and based upon the same examination, states that:

1. At the present time, Mr. Garrett appears to be in a reasonable state of adjustment. This is probably due to the fact that his condition is in remission and that the medicine, which is being supplied, helps considerably to keep him adjusted.

2. To place him on a witness stand could certainly break down his adjustment mechanism, shatter his defense and might even precipitate a psychotic episode. I do not anticipate this picture will change much in time.

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10. Dr. Kurth's qualifications were not challenged. He testified that he had beeen a physician since 1935; that he had been trained in psychiatry during residencies at hospitals in Kansas, California, and at the Mayo Clinic in Rochester, Minnesota; and that he had been a specialist in psychiatry since 1940.

These are the comments that are followed by, and show the context of, Dr. Kurth's statement, which is quoted in Respondent's brief, that:

> . . . if he is ever going to need to go on the witness stand, or a deposition be taken, I feel that he is currently in as good a condition of adjustment as one might anticipate in the foreseeable future.

This statement, in context, falls far short of an opinion that Garrett is in a satisfactory condition to testify. Moreover, the paragraph immediately preceding it clearly states that Garrett's present condition of precarious balance cannot be expected to improve in the foreseeable future.

Dr. Kurth testified that he had not been informed of Garrett's conduct immediately following his testimony in the trial of the injunction proceeding in January-February 1967 and that he did not know of Garrett's conduct in early May 1968, when he was confronted with the probability of being called to testify pursuant to the Board's remand order. After learning of this incident, Dr. Kurth testified that in his opinion, if Garrett were to receive notice that he would be required to testify again concerning the labor dispute and that his earlier testimony on this matter would be subjected to reexamination, these influences would produce a condition of anxiety, the intensity of which he could not predict.

Respondent has pointed out that Garrett testified before Judge Brown in the District Court on September 13, 1967, on a motion to adjudicate Respondent in civil and criminal contempt of the Section 10(j) injunction, and that there was no evidence that his testifying produced any

psychological reaction at that time or subsequently thereto.[11]

It appears beyond doubt that, since the events of June to September 1966 which form the basis for the findings of unfair labor practices herein, Thomas E. Garrett has twice suffered serious emotional and psychological disturbances connected with his testifying concerning them. Both Dr. Adams and Dr. Kurth testified that, in their professional opinion, there is a strong likelihood that, if faced with a requirement that he testify again concerning those events, Garrett's emotional stability would again be upset to the extent that he would be unable to testify reliably and that his general psychological condition might again become psychotic.

Other than the fact that Garrett did testify, in September 1967, on different, contemporaneous, and relatively undisputed matters, there is no evidence now before me to contradict the expert testimony of these two psychiatrists concerning Garrett's probable reaction if required to testify at a reopened hearing on the unfair labor practices. Were this a criminal prosecution, in which the applicable standard of proof is "beyond a reasonable doubt," I might be constrained to hold the fact that he testified in

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11. At Respondent's request, I have read Garrett's testimony at that hearing, not to make any finding upon it, but only to determine whether there are any superficial indications reflecting on his ability to testify. I find from the transcript of Garrett's testimony that it dealt almost exclusively with Garrett's return to work pursuant to the injunction and that questions by the General Counsel concerning Garrett's original training in the plant in 1966 were objected to by Respondent's Counsel as "an attempt to go back into his case in chief." Moreover, I find nothing in the transcript contributing toward a determination of whether Garrett would be able to give reliable testimony concerning the matters at issue in this unfair labor practice case.

September 1967, without suffering a breakdown, sufficient to create a reasonable doubt that a breakdown would follow if he were directed to give testimony in accordance with the order of remand. Greater weight than this, however, I cannot give to this fact, as opposed to the credible testimony of the two psychiatrists who agreed that, to require Garrett to testify again, concerning both the activities held herein as unfair labor practices and his former testimony on the subject, would probably precipitate a situation in which any testimony he might give would not only be unreliable but from which he might suffer serious psychological injury. Since I am convinced that the decision on the matter before me, like the decision of other issues before the Board, is properly to be determined by a fair preponderance of the evidence, I cannot avoid the conclusion that the undisputed evidence of the two psychiatrists concerning the likely effect of requiring Garrett to testify far outweighs the slight possibility that he might testify competently and without serious psychological aftereffects.

From the foregoing it follows, and I find, that Thomas E. Garrett is now physically unable to testify as prescribed in the Board's order and that his condition is not likely to improve in the foreseeable future. Accordingly, I return this matter to the Board with the recommendation that it rescind the order of January 30, 1968, and that its consideration of Respondent's exceptions to the Trial Examiner's Preliminary Decision proceed upon the record now before it.

Dated at Washington, D.C.

UNITED STATES OF AMERICA,

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 17-CA-3378

GEORGE A. ANGLE, d/b/a KANSAS
REFINED HELIUM COMPANY

and

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

(Judgment Entered June 25, 1969)

On July 2, 1968, Trial Examiner George L. Powell issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent, the Charging Party, and the General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this

case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, George A. Angle, d/b/a Kansas Refined Helium Company, Otis, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C. June 25, 1969.

John H. Fanning, Member
Howard Jenkins, Jr., Member
Sam Zagoria, Member

(Seal) National Labor Relations Board

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 17-CA-3378

GEORGE A. ANGLE, d/b/a KANSAS REFINED HELIUM COMPANY

and

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO

Gerald A. Wacknov, Esq., of Kansas City, Mo., for the General Counsel.

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1. Cf. *George A. Angle, d/b/a Kansas Refined Helium Company*, 176 NLRB No. 115, concurrently issued herewith, wherein senior operators were found not to be supervisors within the meaning of the Act.

Marvin J. Martin, Esq., of *Martin, Wooley & Churchill*, and *Robert Martin, Esq.*, of *Collins, Martin, Pringle, Schell and Burns*, of Wichita, Kans., for the Respondent.

Gene Ralston Esq., and *Patrick F. Kelley, Esq.*, of Wichita, Kans. and *Jay Dee Patrick*, International Representative, of Joplin, Mo., for the Charging Party.

TRIAL EXAMINER'S DECISION

Statement of the Case

GEORGE L. POWELL, Trial Examiner: This case was tried before me at Great Bend, Kansas on January 23 and 24, 1968. The complaint issued December 4, 1967, based upon a charge and an amended charge filed on October 18, 1967, and October 30, 1967 respectively. Briefs of the parties were filed on February 21, 1968. Presented is the question of whether Respondent suspended employee Arel Rodgers for cause or because of his membership and activity on behalf of the Union, and whether he was subsequently discharged because he acted as a witness and gave testimony under the Act. Sections of the National Labor Relations Act (29 U.S.C. Section 151, *et seq.*), herein called the Act, alleged to have been violated are 8(a)(3), (4) and (1).

On the entire record of evidence, my observation of the witnesses as they testified, and on due consideration of briefs filed by Respondent and General Counsel, I find that the General Counsel has established by a preponderance of the evidence that Respondent violated Sections 8(a)(3), (4) and (1) of the Act by suspending Arel Rodgers on September 19, 1967 and discharging him on October 2, 1967.

I. Findings of Fact and Conclusions of Law

A. *The Employer and the Labor Organization*

I find that the allegations of paragraph 2 of the complaint respecting the nature and volume of business carried on by Respondent, a sole proprietor in the business of refining and selling helium gas at a plant located outside the corporate limits of Otis, Kansas, is true and conclude therefrom that Respondent at all times material herein was an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act. There is no dispute as to this aspect of the case.

I also find and conclude that the Union, Oil Chemical and Atomic Workers International Union, AFL-CIO, herein called Union or Charging Party, at all times material herein has been a labor organization within the meaning of Section 2(5) of the Act, another aspect of the case not controverted. . .

B. *Background*

It is essential to know the background of this case in order to understand the happenings in September and October 1967.

Arel Rodgers had been an employee of Respondent since approximately July 1965. At that time the plant was in the final stages of construction and Rodgers was involved in the initial start of production. He was a senior operator whose duty, according to him, was to run a control panel and to direct the other two junior operators and "keep them on a string." A little over a year later, on September 20, 1966, he, with five others, was discharged. This followed the advent of the Union and led to the issuance of an unfair labor practice complaint. However, before the complaint proceedings came to trial, the Board instituted Section 10(j) injunction proceedings under the

Act, in an effort to get the dischargees reinstated, in the District Court for the District of Kansas which proceedings took place in January 1967. Then the complaint proceedings came to trial before Trial Examiner Sidney Goldberg. Some 4 months after the injunction proceedings were heard in January, the District Court, on April 5, 1967, issued a temporary injunction and ordered the reinstatement of the six employees should they deisre to go back to work prior to any Board decision. Only two of the six elected to return to work, one was Junior Operator Thomas Garrett, and the other was Senior Operator Rodgers. Rodgers returned to work on July 19, 1967. Robert Martin, attorney for Respondent, admitted that when Rodgers returned to work "he was being trained in a supervisory capacity, actually he was in training . . . and not fully performing the duties [of a senior operator]."

On July 20, 1967, the day following Rodgers' returning to work, the Board filed a petition for civil and criminal contempt.

On August 9, 1967, Trial Examiner Sidney Goldberg re-opened his hearing to include in the complaint an allegation of violation of Section 8(a)(5) of the Act.

On August 28, 1967, the United States Court of Appeals for the Tenth Circuit modified the District Court's injunction of April 5, 1967, by reversing as to Rodgers, on the ground that the question of whether he was a supervisor should be decided by the Board.

On September 12, 1967, Trial Examiner Goldberg issued his decision finding: 1) that senior operators were not supervisors within the meaning of the Act (in a previous representation case the Regional Director had found senior operators to be supervisors); and 2) that the discharge of the six employees violated Section 8(a)(1) and (3) of the Act requiring their reinstatement.

On September 13, 14 and 15, 1967, the civil and criminal contempt proceedings (which had been filed on July 20, 1967) was heard in the Federal District Court following which the Judge in a bench decision, denied the Board's petition.

On September 20, 1967, Rodgers was suspended for various reasons outlined in a letter dated September 19, 1967, of which more will follow, and, on October 2, 1967, Rodgers was discharged by letter bearing the same date, of which more will be said later.

This matter relates only to the question of whether Rodgers' suspension of September 20, and his discharge of October 2, 1967, were in violation of the Act. On August 9, 1967, Rodgers had appeared under subpoena at the reopened hearing, above, although the General Counsel presented no witnesses at the August 9 proceeding. Rodgers did appear and did testify on September 13, 14, and 15, 1967, as a witness under subpoena for the Board in the above civil and criminal contempt proceedings.

C. *Rodgers' Reinstatement*

According to Plant Manager Henry Tyler, when Rodgers returned to work on July 19, 1967, under the injunction order, Rodgers was to be treated as ". . . an older, valued employee that had been ill and away and [Tyler was] to do everything he could to get him reoriented as soon as possible." Tyler also received specific instructions from Angle and his lawyer, Marvin Martin, over the telephone and then received a written summary of some 18 or 20 specifics having to do with the treatment of Rodgers. Tyler testified there was to be "no harassment, not to reprimand him or if he did so to go through counsel . . . ."

Upon returning to work on Wednesday July 19th, Rodgers was given some training manuals and flow charts and

was told to study, as a refresher, the manuals and color the flow charts in the office of Harry Harms, plant engineer, who was on vacation. Tyler also had questions he would ask Rodgers to answer. After receiving these instructions, Rodgers asked permission to get a cup of coffee. Tyler replied, "No, I want you to stay here. I want to post a notice on the bulletin board because the men don't know you are back to work and I want to save any embarrassment so I will post a notice on the board first." Tyler returned to where Rodgers was working in Harms' office about an hour and a half later and gave permission to get the coffee. Also on the first day back to work Rodgers said "hello, George" (previously he customarily called Angle by his first name) as he saw Angle standing at the bulletin board cleaning his fingernails with a pocket knife. Angle looked at Rodgers but did not speak to him. Later in the day Rodgers passed Tyler's office on his way to get a cup of coffee and heard Angle tell Tyler, "I would like to get that sonofabitch [sic] outside," and as Rodgers passed the room, Tyler and Angle saw him and they "just kind of ducked a little bit."

No notice was posted on the bulletin board informing the employees of Rodgers' returning to work. Except for getting coffee, Rodgers never left Harms' office from the day he returned to work on Wednesday, July 19, through the end of the workday, Friday, July 21. After work that day, according to Rodgers, "I asked Mr. Tyler if it would be all right if I went to the maintenance building or any place I wanted to go in the plant." "He [Tyler] said it would be fine." Thereafter, from time to time Rodgers would leave Harms' office, go into the plant, and examine a piece of equipment and then return to his office in order to write out an answer to various questions submitted by Tyler. This activity continued for a period of "2 or 3 weeks."

From time to time Tyler would ask Rodgers questions regarding the retraining program. At one of these instances, Rodgers suggested that if he were retraining a man, he would put him right where he was going to work "and get him to do the job himself." Thus, Rogers was suggesting that he be put back on the Board where he had been before his discharge. Tyler did not do this. At another time Tyler told Rodgers that he thought he might put Rodgers out with a junior operator to help speed up the retraining program. Tyler never did this, however. Although Tyler testified regarding Rodgers' reorientation that Rodgers was "noncommittal" when asked questions and that sometimes he "didn't respond" or "he got no reaction from him", he had earlier testified in a deposition that he had no complaints about Rodgers' conduct on the job as to the way he conducted himself and that he did not argue with anybody.

For his retraining Tyler wanted Rodgers to watch the senior operators and ask questions when necessary. When this began is not clear but it did not begin during the first 3 days of Rodgers' reemployment. Tyler told the senior operators, in Rodgers' presence, to train him "in the normal manner and to make their move to explain why they made it." But they did not at all times explain their moves and tell him why they made them. Whether this failure was because Rodgers already knew the moves and why they were made (because he was a former senior operator and indeed had trained Merle Smith who had taken his place as senior operator in Septen ver 1966 and who testified to some embarrassment in "training" Rodgers) or whatever the reason, the record does not show it and the burden to explain the failure was on Respondent.

Rodgers performed duties in addition to those which were told him to do, above. For example he rearranged

some operational manuals, made new cards for the conversions for the control panel, familiarized himself with the three new instruments which had been installed on the panel and started taking readings on them every 2 hours. Prior to his September 1966 first discharge he had run the control panel alone, without any higher authority. He asked questions during his retraining but only when he felt a need to do so to understand why the senior operators were doing a particular thing.

Analysis of the Retraining Program

Tyler's point about Rodgers being noncommittal has little weight with respect to any question of whether Rodgers was cooperative in his retraining. Apparently Tyler wanted Rodgers to comment when he asked him if it would do him any good to be sent out with a junior operator. Consider this in the light of knowledge that Rodgers had previously been a senior operator over two junior operators. Only Tyler knew of the new changes in the plant since Rodgers had been a senior operator and only Tyler would know the answer to his question. If Rodgers answered in the affirmative, it would be evidence that Rodgers himself felt the need of retraining even as a junior operator. If his answer was in the negative, it would be evidence of lack of cooperation with Respondent in its new expanded plant operation. Being noncommittal, Respondent maintains that Rodgers' conduct falls within the area of being noncooperative. This position is not sustainable.

An abundance of time was taken at the trial by Respondent in an effort to establish the point that Rodgers, after being reinstated on July 19, had lied to the Board in order to get the Board to prosecute Respondent for civil and criminal contempt. At the instant trial, Rodgers

testified that he was not allowed the run of the plant until he asked Tyler for permission to do so at the close of the day on Friday, July 21, his third day back at the plant. For the first 3 days of his reinstatement he was confined to the office of Harms except for coffee. Tyler told him he was going to post a notice on the bulletin board that Rodgers was back to work before Rodgers could go into the plant, but such notice was not posted. Rodgers could reasonably conclude he was not permitted into the plant.

There would be a variance with the record in this case if Rodgers had testified in the contempt proceedings that he was in a cubicle (Harms' office) more than the first 3 days following his reinstatement under the injunction. As Respondent has alleged that Rodgers lied in the contempt proceedings it has the burden to prove the lie. Testimony from the contempt case, read into the record by Respondent, is to the effect that after Friday, July 21 Rodgers was not restricted to Harms' office. This is consistent with the testimony in the instant case, and Respondent has not proven Rodgers lied. Counsel for Respondent attempted to make more of the word *cubicle* than is possible and, indeed, the Trial Examiner himself in the heat of the trial called the attention of the General Counsel to the fact that Rodgers said nothing at this trial about being kept in a *cubicle* and, hence, his testimony varied. Upon a careful examination of the record, free from the trial arena, I find it immaterial that Rodgers used the phrase *cubicle* in the contempt matter but not in the instant matter, as what was being referred to in both instances was the same thing, Harms' office.

Likewise, Rodgers did not lie when he told the General Counsel before the civil and criminal contempt proceedings were instigated that he was confined in the "cubicle." That was the fact *at that time* as the contempt matter began

on July 20 before Rodgers obtained permission to go into the plant. Rodgers also had told the General Counsel that he had not been reinstated properly under the injunction as he was not reinstated as a senior operator but rather he had been reinstated in a training position. Respondent's counsel admitted this latter fact so there could have been no "lie" to instigate the contempt matter.

Finally, Respondent can not successfully claim that the dismissal of the contempt matter went to the merits of the action, clearing Respondent of the allegations made therein by the General Counsel thereby establishing that Rodgers lied in order to bring the contempt matter. The reason Respondent cannot do this is because there are many reasons e.g. lack of proof beyond a reasonable doubt and removal of the injunction, why the District Court would dismiss from the bench in these circumstances.

D. *Rodgers' Suspension and Discharge*

Rodgers participated in the civil and criminal contempt proceedings by testifying on September 13, and by being present in an advisory capacity to the General Counsel on September 14 and 15, 1967.[1] As noted above, the Federal District Court denied the Board's petition for civil and criminal contempt in a decision from the bench with no reasons being given.

On the following day, Saturday, September 16, 1967, Rodgers came to the plant and picked up his check. While there, he engaged in conversation, for up to 40 minutes, with two junior operators, a senior operator and a maintenance man. He talked about the recently issued (September 12) decision of Trial Examiner Goldberg. He had a copy of the decision and let some of the others read its

1. By letter dated September 27, 1967, Angle refused to pay Rodgers for the latter 2 days.

Appendix. There was discussion among them as to whether or not Angle would sign the Appendix but Rodgers was of the opinion that it would be posted. They also talked about the contempt of court proceedings which had just been concluded. Rodgers told them, "We had taken a real drubbing there . . . ." Before he left the plant that day Rodgers saw Harry Harms, the plant manager, but had no conversation with him. There were no rules in effect that the plant was not open to employees who were not on duty. In fact, many employees visited the plant during their off-duty hours. Saturday was off duty for Rodgers.

The event which admittedly triggered the suspension of Rodgers occurred the following Tuesday, September 19, 1967. Rodgers was on a shift that worked from 8 a.m. to 4 p.m. At around 2 or 2:30 p.m. Rodgers, standing in the hallway in front of Tyler's office when Tyler came by, asked Tyler if he had a few minutes for a talk. Tyler replied that he would have the time and invited Rodgers into his office where the two sat down. Rodgers, with reference to the Sidney Goldberg decision above, asked Tyler if the "Goldberg ruling had to be posted." Tyler replied that he did not know, but if it was supposed to be posted Respondent would post it because it had posted everything in the past. Rodgers then said, "Well, I don't know whether it does have to be. Do you know for sure?" When Tyler replied that he did not know for sure, Rodgers called his attention to what was said in the Appendix of the decision that if there were questions they should call Kansas City. He then asked Tyler if it would be all right if he could make a telephone call. Tyler gave permission and Rodgers went to his car to get his copy of the Goldberg decision before making the call. On his return, he went into Harms' office to use his telephone, but before doing so, asked Tyler if it would be all right to use Harms' telephone. At that time Tyler replied "No, you can't talk."

Rodgers asked him if he meant that he couldn't call at all and was told "you can't call now." At that time, Rodgers pointed to the bottom of the Goldberg decision, wherein it states "If employees have any questions concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 610 Federal Building, 601 East 12th Street, Kansas City, Missouri, 64106, Telephone FR 4-5181." At that point Tyler told Rodgers "I don't even know if this is the right thing . . . I am going to call Wichita." Rodgers replied, "Well, after you call Wichita if they say it is all right, can I go ahead and call them up?" Tyler replied "as it stands now you can't call." Rodgers said "Okay" and went back to his job in the control room. This whole incident lasted from 3 to 5 minutes, including the time it took Rodgers to go to the car for the copy of the decision. The above facts are based on the credited testimony of Rodgers. Tyler admitted that following the conversation with Rodgers he telephoned Angle twice before the end of the day and once more in the evening about Rodgers. The first call went "ten or fifteen minutes" and the "second one was longer."

The following day, September 20, 1967, shortly after Rodgers reported for work, Tyler had him come to his office where he handed him an envelope and told him to open it and read the letter enclosed therein. After Rodgers had read the letter, which suspended him until further notice, Tyler told him to get his lunch bucket and then he accompanied Rodgers to the main gate of the plant.

The letter which Tyler handed Rodgers was dated September 19, 1967. It was introduced into evidence as General Counsel's Exhibit No. 4 and, except for the headings, it is reproduced in full as follows:

Henry Tyler has reported to me the events of today in which, as I understand it, you insisted that certain written material be posted immediately on the plant bulletin board by Mr. Tyler; insisted that he read this document that you had in your possession; and attempted to make a private long distance telephone call from the plant and when Mr. Tyler refused to allow you to do so on company telephone and company time, you questioned him repeatedly as to whether this was his final decision.

This conduct by you occurred on a day when the plant was off-line and certain emergency conditions occurred and recurred. Mr. Tyler was extremely busy, as was everyone else in the plant, but you saw fit to select this time to create a disturbance concerning matters for which you have no responsibility and which are entirely foreign to your duties in the plant.

I want you to understand that Mr. Tyler is in charge of this plant and you are not in charge of it, and you will not be allowed to dictate to Mr. Tyler what is to go on the bulletin board or anything else with respect to the operation and maintenance of this plant and its personnel.

I also wish to inform you that I agree completely with Mr. Tyler's decisions in this matter. You will not be permitted to make or transmit reports to the NLRB or anybody else outside the plant, on company time or with the use of company facilities. Whatever complaints you may have as to the management of this company or the plant operations, you are completely free to report to anyone you choose so long as you do it on your own time.

As the result of today's activities, you are suspended until further notice from me, in writing. Your suspension is effective immediately and is without pay. You are not to come on the company premises during

the period of your suspension. Your check for wages due you through today will be sent to your home.

Very truly yours,

Kansas Refined Helium Company
George A. Angle

GAA:mvs
cc: Mr. Henry Tyler

By letter dated September 27, 1967 (G.C. 6), Respondent sent Rodgers a check covering "the pay period ended September 17 plus the 2 days September 18 and September 19." This was the letter telling Rodgers he was not being paid for September 14 and 15, 1967 because he had concluded his testimony on September 13 and was merely advising the General Counsel the other 2 days.

Some 5 days later on October 2, 1967, Angle wrote the letter to Rodgers which discharged him. This appears in the record as General Counsel's Exhibit No. 5, and, because reasons for the discharge are given in the letter, the body of it is set forth completely as follows:

Dear Mr. Rodgers:

During the time that you have been on suspension from the Kansas Refined Helium plant, I have obtained detailed reports from the plant personnel respecting the incident which brought on the suspension and, in addition, I have reviewed carefully your performance in the plant and your activities and attitude over the entire sixty-day period of your employment from July 19 to September 19.

The information now at hand is sufficient to convince me that the events in which you were involved on September 19, were not just an isolated instance of misconduct, but, instead, were part of a recurring pattern of behavior from which it is perfectly clear that you are in the plant for the purpose of causing trouble

for me and for the employees, rather than to perform the work and services for which you are paid. The principal events and circumstances to which I refer are these:

In addition to interfering with Mr. Tyler's management of the plant in the manner described in my letter of suspension, I have since learned that on the preceding Saturday, you came to the plant during your off-duty hours and talked to some of the employees who were on duty, about the N.L.R.B. Examiner's Report, and expressed opinions to them that KRH was required to post copies of the Report and made various observations about the effect of this Report on the plant and its personnel.

At the time you were reinstated, and for several days thereafter, it appears to me that you must have given untruthful accounts of the value and nature of the reorientation program which Mr. Tyler and I had worked out for you. I base this chiefly upon the fact that the statements of the National Labor Relations Board lawyers and their claims to the Court, are utterly inconsistent with your later testimony under oath on depositions and at the trial. Furthermore, your testimony in the depositions and at the trial of the contempt action was not accurate and departed from the testimony of others and from information furnished to me by other people at the plant. In other words, it seems clear to me from what took place in the contempt hearing, that you deliberately set out to give false reports and help build a case of contempt against me which was not justified by the facts.

During the time that you have been reemployed, you have kept notes concerning the activities of Mr. Tyler and other supervisors in the plant, taken down information concerning my telephone calls and requests for information at the plant, and you have turned this information, which really was none of your business, over to government authorities, presumably in the hope that it would be useful in the attempted prosecution for civil and criminal contempt. I want to

make it clear that I think you have the right to talk to government authorities or N.L.R.B. lawyers or anyone else, and you have the right to convey complaints to them, so long as they are truthful, which, I am of the opinion, they have not always been. But truthful or not, you do not have the right to spend time at the plant while I am paying you, gathering and writing down information which is really none of your concern, for any purpose, or to pass along to anyone, and that is what you have been doing.

The fact that you intend to continue utilizing company time to gather information which you think might be used to my disadvantage, is amply supported by your testimony in the depositions taken in the contempt action. You made it clear in your testimony that you would continue to use company time to gather and write down information as long as you felt it was to your advantage personally.

I believe that one of the most serious departures from proper conduct, is revealed by one of the notations in your notebook which I first learned about during the contempt trial and which I believe was to the effect that when Mr. Tyler asked you questions during your retraining program in order to find out what you had learned and what you had not learned in the program, you were very noncommittal in your answers. I am again convinced that this was a deliberate effort on your part to impair the effectiveness of a retraining program which Mr. Tyler was administering in good faith, at my instructions, and for your education so that you could assume normal duty in the plant. In this connection, I have also been furnished information from other employees to the effect that you did not seriously attempt to retrain yourself, but rather, stood around without asking questions or giving any indication of what you needed to learn in order to be properly trained to do your job.

You have presented me with very serious problems from the standpoint of your relationship with

other employees in the plant, and these arise from two sources:

First, in the latest N.L.R.B. hearing, although subpoenaed as a witness by the government, you were not called upon to testify, but instead, sat beside the government lawyer and transmitted information to him from which to examine and cross-examine other employees in the plant. I could understand this and even overlook it, but your fellow employees resented it and I can understand their attitude as well.

Second, is the fact that according to other employees, some of the information which you gave from the witness stand in the contempt hearings and particularly your testimony that certain senior operators had neglected to carry out Mr. Tyler's instructions respecting your retraining, were false. This was a reflection upon your fellow employees which they deeply resented.

You are aware, of course, that since the decision of the Court of Appeals, I have had no obligation to continue your temporary reinstatement; however, I had made up my mind to continue your employment in the hope that you would straighten out after the contempt action was over, enter into the retraining program and become a good and qualified employee. I thought that once that case was successfully defended, perhaps you would stop your efforts to harass the management of KRH and the other employees, but it is perfectly apparent from your conduct between Friday, September 15, and Tuesday, September 19, when you were suspended, that your attitude and your conduct have not changed. It is now perfectly clear to me that you will not straighten out and will not become a satisfactory employee and that your continued presence in the plant will serve only to create difficulties between yourself and other employees, and continue to take the time and attention of Mr. Tyler and myself, and others who have the responsibility for the management and operation of that plant.

The Kansas Refined Helium plant is not a shoe factory or assembly line operation. This plant is a very technical, complex plant, the first volume liquid helium plant ever built, the largest liquid helium plant in the world. It is a highly automated plant, but it is dependent entirely on the individual decisions made by the plant personnel. Often these decisions must be made within the matter of seconds both by the senior operator, charged with the responsibility of running the plant, and any one of the junior operators, under his supervision. Therefore, it is important that all KRH operating personnel be entirely familiar with the plant and their duties, alert and constantly 100% attentive to their duties in order to prevent a mistake that could possibly amount to thousands of dollars, and perhaps, injure or kill other employees. This responsibility falls primarily on the senior operator who is in complete charge of the plant operations and the operating personnel under him. I have several years of my life and most of my assets at stake in the successful operation of this plant. Given a choice, I cannot afford to have employees in the plant who have a desire to embarrass or harass the plant management, and who spend their time doing something else than learning their job and performing it.

Under these circumstances, I feel that I have no alternative but to discharge you, and that is the purpose and ultimate conclusion of this letter. I want to make it clear to you, again, that I have, in the past and will, in the future, comply with the orders of any court respecting the employment, continued employment, or reinstatement of any employees; but so long as I am free to determine whether or not I will employ you, I will have to base the decision upon your attitude and your performance, and its comparison with the attitude and performance of other employees. I am sorry that your reinstatement at the plant has not been success-

ful, but it has been entirely the result of your own conduct.

Very truly yours,

George A. Angle

E. *Respondent's Defense, Analysis and Conclusions*

There are three issues, according to the brief filed by Respondent, in this matter and they are as follows:

1. Does the Board have jurisdiction to move on the dismissal of Rodgers who was "temporarily reinstated" under a Federal District Court injunction?

2. Is Rodgers a "supervisor?"

3. Was Rodgers' false statement to the National Labor Relations Board which caused unfounded civil and criminal contempt proceedings to be brought against Respondent, together with Rodgers' other activities proper grounds for dismissal, regardless of his supervisory or temporary reinstatement status?

As to 1), Respondent argues that the Board's authority is limited to protect employees relative to *permanent* employment but the District Court had authority for *temporary* employment under a temporary injunction. Accordingly, when Rodgers resumed work in July 1967, it was under *temporary* reinstatement from the District Court's injunction, and hence, the Board had no jurisdiction over this temporary reinstatement. This proposed reading is a notable example for looking at the bright side of a subject under scrutiny, but I find the words will not bear the suggested interpretation. It is true that the District Court is the forum for raising a question of whether or not a reinstatement under a temporary injunction fulfills the Court's order, but the National Labor Relations Act protects the employee from subsequent discrimination once

compliance with the Court Order is met. Rodgers' suspension and discharge were not made because the injunction had been lifted by the Circuit Court of Appeals. This is clearly stated by Respondent in its letter dated October 2, 1967, in which Angle stated "You are aware, of course, that since the decision of the Court of Appeals, I have had no obligation to continue your temporary reinstatement; however, I had made up my mind to continue your employment in the hope that you would straighten out after the contempt action was over, go into the retraining program and become a good and qualified employee." This establishes the fact that Rodgers was retained as an employee after the District Court's injunction had been removed. Thus, the jurisdiction of the District Court had been lifted.

As to the second proposition, or question of whether Rodgers was a "supervisor" it is enough to say that this question need not be resolved in this case. Whatever Rodgers' position was as a senior operator before his discharge in 1966, it is clear that from July to September, 1967 he was not a senior operator by the admission of Respondent's own counsel, and was no "supervisor" in these proceedings. This does present a problem with respect to the Remedy. A remedy of reinstatement in this case could only go to reinstatement of Rodgers as an employee undergoing a retraining program for senior operators as that is all that is before me. Hence I do not pass on the question of reinstatement under the Goldberg decision, but if such is finally ordered, it, and not this decision, will govern the ultimate reinstatement of Rodgers.

As to the third issue in the brief, I have already discussed and found that Respondent did not sustain the burden of proof that Rodgers gave false statements and hence, this could not have been a cause for the discharge.

As to the other activities they are related in the above letters and will be taken up in order. Respondent states in its letter of September 19 that Rodgers "insisted" on "immediately" posting material on the bulletin board and "insisted" that Tyler read the document, and attempted to make a long distance telephone call all at a time when the plant was undergoing emergency conditions. Angle characterized Tyler as being "extremely busy, as was everyone else in the plant," and that Rodgers selected this time "to create a disturbance." The credited testimony however is to the contrary.[2] Rodgers first asked Tyler if he had a few moments for a discussion and Tyler invited him into his office where they sat down and discussed the problem. At the time of the discussion with Rodgers, Tyler did not indicate that he was under pressure or that Rodgers was making a nuisance of himself or was not performing something he should have been doing in an emergency situation. When Tyler told Rodgers that he could not make the telephone call, that ended the matter and Rodgers left. This activity of Rodgers cannot fairly be said to rise to the importance of his attempting to "dictate to Mr. Tyler what is to go on the bulletin board or anything else with respect to the operation and maintenance of this plant and its personnel." Rodgers had a protected right to discuss the Goldberg decision after securing Tyler's permission to talk for a few minutes. Whether or not in fact there was an "emergency situation," Tyler took much more time in making two telephone calls that day to Angle reporting

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2. The demeanor of the witnesses has played a most important part in my crediting Rodgers over witnesses for Respondent where testimony was in direct conflict. Rodgers was subjected to highly critical and sharp cross-examination by Respondent's counsel yet his testimony had the ring of truth and sincerity. On the other hand, Respondent's witnesses, on crucial testimony, appeared to flounder and seemed embarrassed over what they were saying.

on Rodgers than he took up in talking to Rodgers. Tyler admitted spending "ten to fifteen minutes" in his first call and longer in the second. Thus he was not too busy to talk to Rodgers.[3] Accordingly, I find that the reason given for the suspension is a pretext and that the real reason, was Rodgers' attempt to get the Goldberg decision posted on the bulletin board which conduct would fall within protected activity within the meaning of the Act. By suspending him without pay under these circumstances Respondent discriminated against Rodgers in regard to tenure and terms and conditions of employment to discourage union activity in violation of Section 8(a)(3) and (1) of the Act.

As to the discharge letter of October 2, 1967, Respondent indicates in the second paragraph that Rodgers' activities were causing him trouble. As the only activities established by the evidence was protected union activities it is clear that these were motivating Angle. The first instance referred to was the protected union activity of Rodgers in discussing the Goldberg unfair labor practice decision on Saturday with some other employees. The second incident relates to the allegation that Rodgers gave untruthful accounts which allegation has not been substantiated as found above. The next allegation in the letter has to do with notes Rodgers took. He admitted to taking notes, about which there was no restriction or rule. He was doing this for his own information and protection, and he refreshed his recollection in giving testimony in the contempt case from the notes. Under these circum-

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3. Tyler then changed his testimony and said the calls to Angle were short although the second one involved a conference call with the attorney involved. I believe his first impression is more accurate and was given before he had fully thought out all of the consequences.

stances Respondent cannot persuasively urge me to believe this had anything to do with his discharge. The point concerning the reference by Rodgers that he was "noncommittal" has been previously discussed and found to lack merit. Respondent then admits that Rodgers' testimony at the National Labor Relations Board hearing had something to do with his discharge. This is an admission of a clear violation of Section 8(a)(4) of the Act, and I so find. As the testimony given by Rodgers has not been found false there could be no legal grounds for fellow employees to be resentful and this excuse for the discharge is found to be without merit. Accordingly, I find that the letter of October 2, 1967 is an admission by Respondent that one of the reasons, and indeed a controlling reason, for Rodgers' discharge was because he gave testimony in a Board proceeding. Employees are protected from discharge for this reason by virtue of Section 8(a)(4) of the Act.[4]

F. *Conclusions of Law*

1. Respondent is, and during all times material has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Oil, Chemical and Atomic Workers, International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has established by a preponderance of the evidence that Respondent has violated

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4. Sec. 8 (a) It shall be an unfair labor practice for an employer—

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

Section 8(a)(1), (3) and (4) of the Act as set forth above. The remedy therefor will be provided below.

G. *The Remedy*

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom, and that it take certain affirmative action designed to effectuate the policies of the Act in the particulars set forth in the Recommended Order. For the reasons which are stated in *Consolidated Industries, Inc.*, 118 NLRB 60, 61, and cases cited therein, I shall recommend a broad cease-and-desist Order. Where the recommendation is to make an employee whole for any loss of earnings suffered as a result of discharge or other discriminatory action, the sum to be paid to him shall be computed in accordance with the formula set in *F. W. Woolworth Co.*, 90 NLRB 289, with interest thereon at 6 percent per annum, as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

II. Recommended Order

Upon the basis of the above findings of fact and conclusions of law and upon the entire record in the case, it is recommended that The Respondent, George A. Angle d/b/a Kansas Refined Helium Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Oil, Chemical and Atomic Workers, International Union, AFL-CIO, or any other labor organization, by suspending employees or by discriminating against employees in any other manner in regard to hire, tenure, or any other term or condition of employment.

(b) Discharging or in any other manner discriminating against employees because they have given testimony in a proceeding under the Act.

(c) In any other manner interfering with, restraining or coercing its employees in the exercise of their right to self organization, to form, join, or assist Oil, Chemical and Atomic Workers, International Union, AFL-CIO, or any other labor organization, and to engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities.

2. Take the following affirmative action which I find will effectuate the purposes of the Act.

(a) Offer to Arel Rodgers immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, in the manner described in "The Remedy" Section of this Decision.[5]

(b) Notify Arel Rodgers, if presently serving in the Armed Forces of the United States, of his rights to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military and Training Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all

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5. It is understood that if the final outcome of the "Goldberg decision," referred to herein, is that Rodgers is to be reinstated as a senior operator, or its equivalent, it takes precedence over this case as to the job to which Rodgers should be reinstated.

payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(d) Post at its plant located outside the corporate limits of Otis, Kansas, copies of the attached notice marked "Appendix."[6] Copies of said notice on forms provided by the Regional Director for Region 17, shall be signed by George A. Angle, d/b/a Kansas Refined Helium Company. The posting shall take place immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 17, in writing, within 20 days from the date of receipt of this Decision what steps Respondent has taken to comply herewith.[7]

Dated at Washington, D. C.

/s/ George L. Powell
George L. Powell
Trial Examiner

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6. In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

7. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 17, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE

NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL NOT discourage membership in OIL, CHEMICAL, AND ATOMIC WORKERS, INTERNATIONAL UNION, AFL-CIO, or any other labor organization, by suspending employees or by discriminating against our employees in any other manner in regard to hire, tenure, or any other term or condition of employment.

WE WILL NOT discharge or in any other manner discriminate against our employees because they have given testimony under the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organization, to join or assist the Union, or any other labor organization, or engage in other concerted activities for the purpose of collective bargaining or other such mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities.

WE WILL OFFER to Arel Rodgers, full reinstatement to his former or substantially equivalent position without loss of seniority or other rights and privileges, and make him whole for any pay he lost because of the discrimination against him with interest.

All our employees are free to become, remain, or refrain from becoming or remaining, members of Oil, Chem-

ical and Atomic Workers, International Union, AFL-CIO, or any other labor organization.

GEORGE A. ANGLE d/b/a KANSAS REFINED HELIUM COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

NOTE:—We will notify Arel Rodgers if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 610 Federal Office Building, 601 E. 12th Street, Kansas City, Missouri 64106 (Tel. No. 374-5282).

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 17-RC-5126

GEORGE A. ANGLE, d/b/a KANSAS REFINED HELIUM COMPANY[1]

Employer

and

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

(Entered August 25, 1966)

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[2]

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:[3]

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1. The names of the Employer and the Petitioner appear as corrected at the hearing.

2. The various motions and contentions made by the parties are disposed of in accordance with this Decision and Direction of Election.

3. At the hearing, witness Rodgers prepared, at the request of Counsel for the Employer, a sketch of the plant site here directly involved, showing the locations of various facilities on the plant site in relation to the plant itself. This sketch is hereby received in evidence as Employer's Exhibit 9.

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at the Otis, Kansas, plant of George A. Angle, d/b/a Kansas Refined Helium Company, including instrument men and plant-clerical employees, but EXCLUDING office-clerical employees; casual and temporary employees; professional employees, guards, and supervisors within the meaning of the Act; and, employees of other operations of George A. Angle.[4]

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4. George A. Angle is an individual engaged in various aspects of the gas and petroleum industry. He operates the several aspects of his business under separate trade names, such as, in addition to the above-captioned trade name, Red Tiger Drilling Company, Great Plains Drilling Company, Red Tiger Truck Company, Red Tiger Cat Company, Red Tiger Grader Company, Hays Tank Service, Frontier Oil Company, and Comanche Supply Company. There is also a pipeline, controlled, operated, and apparently owned by Angle. The total personnel complement of all these operations approximates 100, some 26 of whom are employed in the operation here directly involved, that is, Kansas Refined Helium Company (hereinafter, the plant), located a short distance outside of the corporate limits of Otis, Kansas. The operations conducted under trade names other than Kansas Refined Helium Company are engaged in exploration for gas and oil, the drilling of wells, the completion of productive wells, the purchasing of pipe for wells, the transportation of equipment, cer-

tain grading operations, and the hauling of water to the various sites. Some of these operations also contract for the rendition of services to operations not connected with Angle. Angle maintains his general office at Wichita, Kansas, from which he directs and administers all his operations. He controls labor relations throughout his entire enterprise, and working conditions are generally uniform, with variances depending on the nature of the particular work to be performed.

The Petitioner seeks a production and maintenance unit limited to the plant. The Employer contends for an employer-wide unit. In addition, and apparently contrary to the Petitioner, the Employer would include two individuals (Joseph Riedl and Charles Myers) and exclude as supervisors four others designated as senior operators in the plant (Harry Harms, Jimmie Ham, Russell Sims, and Arel Rodgers).

Contrary to the Employer and in agreement with the Petitioner, I find that the smaller unit, limited to the plant is appropriate, although an employer-wide unit might conceivably also be appropriate. The record shows that there is no interchange between the plant employees on the one hand, and employees performing work in other operations of the Employer on the other. The plant employees receive no assistance from other employees of the Employer, and the record indicates that certain plant employees have assisted in the unloading of pipe for Red Tiger Drilling on one occasion only, and this was a matter of a few hours. While the record also indicates that plant employees might deliver materials to wellsites, there is no evidence, either that this has been done, or that it would be a matter of some regularity; moreover, this would be no more than could be expected in a situation where one individual controls several operations or related companies. (That a welder employed at the plant on one occasion performed some welding on a fence located on a farm owned by Angle, is immaterial.) Moreover, the record shows affirmatively that plant employees are hired by the plant manager, who exercises the hiring function for the plant only, and that the plant has its own supervisory structure. I find that the plant employees as a group have interests separate from those of other employees of the Employer, and that they constitute a separate unit appropriate for the purposes of collective bargaining.

Riedl and Myers will be excluded as temporary employees. Both are students. While one of them worked in this operation during 1965, and both are working full time during the current summer vacation, they are expected to return to school this fall,

DIRECTION OF ELECTION[5]

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the

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and there is no indication, other than speculation, that they will return to work in the unit here involved at a later time.

The *senior operators* will be excluded as supervisors within the meaning of the Act. The record indicates that the plant operates on an around-the-clock basis, utilizing three shifts, from 8:00 a.m. to 4:00 p.m., 4:00 p.m. to midnight, and midnight to 8:00 a.m. Each shift is staffed by one senior operator and two junior or assistant operators. The maintenance department works from 7:00 a.m. to 3:30 p.m., instrument men from 8:00 a.m. to 4:30 p.m., and the one plant clerical from 8:00 a.m. to 5:00 p.m. The senior operators receive at least 85¢ more per hour than the junior operators and have been told by the Employer that they are part of management. They have authority to shut down operations when this is indicated, and they have done so. While the junior operators are apparently well qualified to perform their duties, they may perform certain operations only when so directed by the senior operator on duty. Moreover, during the second and third shifts, the senior operators work without anybody possessing greater authority being present. In view of the foregoing and the record in its entirety, including the Employer's brief, I conclude and find that the senior operators responsibly direct the junior operators working with them, and that in this connection they are required to, and do, use independent judgment.

The parties' stipulation that general manager Norman Kline, plant manager W. E. Owens, plant engineer Henry Tyler, and maintenance engineer John Stiff are to be excluded as supervisors is noted and approved.

5. An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 610 Federal Building, 601 East 12th Street, Kansas City, Missouri 64106, on or before September 1, 1966. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear, Inc.*, 156 NLRB No. 111.

unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO

/s/ Martin Sacks

Martin Sacks

Regional Director, Region 17

Dated August 25, 1966 at Kansas City, Missouri.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

GEORGE A. ANGLE, d/b/a KANSAS REFINED HELIUM COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

Opinion Below 2

Jurisdiction 2

Question Presented for Review 2

Statutory Provisions Involved 2

Statement of the Case 4

Reasons for Granting the Writ 7

1. The Decision Below Is in Error and Conflicts with the Decisions of Other Courts of Appeals As to the Proper Interpretation of the Statutory Definition of a "Supervisor," under 29 U.S.C. §152(11) 8
2. The Conflicting Circuit Court Decisions Are Causing Litigants to Race to and from Circuits 13
3. The Decision Below Concerns an "Aging and Vexing" Question Which Raises Significant and Recurring Problems Which Are Frustrating the Purpose of the National Labor Relations Act 14

Conclusion 17

Appendix (Printed under separate cover)

Citations

CASES

Angle v. *Sacks*, 382 F.2d 655 (10th Cir. 1967) 6, 13

George A. Angle, d/b/a Kansas Refined Helium Company, 176 NLRB No. 115; 176 NLRB No. 116 (June 25, 1969) 2, 6

Brewery Workers v. *NLRB*, 298 F.2d 297 (D.C. Cir. 1961) 11

Federal Compress & Warehouse Co. v. *NLRB*, 398 F.2d 631 (6th Cir. 1968) 10

Food Employees Local 347 v. *NLRB*, 422 F.2d 685 (D.C. Cir. 1969) 11

Matthews & Co. v. *NLRB*, 354 F.2d 432 (8th Cir. 1965) 10

NLRB v. *American Oil*, 337 F.2d 786 (7th Cir. 1967) 11

NLRB v. *Beaver Meadow Creamery*, 215 F.2d 247 (3rd Cir. 1954) 10

NLRB v. *Elliott-Williams Co.*, 345 F.2d 460 (7th Cir. 1965) 10

NLRB v. *Fullerton Publishing Co.*, 283 F.2d 545 (9th Cir. 1960) 10

NLRB v. *Leland-Gifford Co.*, 200 F.2d 620 (1st Cir. 1952) 9-10, 12

NLRB v. *Metropolitan Life Insurance Co.*, 405 F.2d 1169 (2d Cir. 1968) 10

NLRB v. *Security Guard Service, Inc.*, 384 F.2d 143 (5th Cir. 1967) 11

NLRB v. *Southern Bleachery & Printworkers*, 257 F.2d 235 (4th Cir. 1958) 11

Ohio Power Co. v. *NLRB*, 176 F.2d 385 (6th Cir. 1949) 9

Oil, Chemical and Atomic Workers Union (OCAW) v. *NLRB*, 445 F.2d 237 (D.C. Cir. 1971) 6, 7, 8, 9, 11, 12, 13, 14, 15

Sacks v. *Angle*, U.S. District Court for Kansas, Case No. W-3766, 65 LRRM 2098 (1967) 5

West Penn Power Co. v. *NLRB*, 337 F.2d 993 (3d Cir. 1964) 10

STATUTES

National Labor Relations Act:

29 U.S.C. §152(3) 2, 14

29 U.S.C. §152(11) 3, 8

29 U.S.C. §158(a)(3) 3

29 U.S.C. §158(a)(5) 3

29 U.S.C. §160(f) 6, 14

MISCELLANEOUS

House Report, 80th Congress, First Session, pages 13-17 16

IN THE

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OCTOBER TERM, 1971

No. _____

GEORGE A. ANGLE, d/b/a KANSAS REFINED HELIUM COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, George A. Angle, d/b/a Kansas Refined Helium Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on September 10, 1971.

OPINION BELOW

The Opinion of the Court of Appeals appears in the Appendix hereto, and was reported at 445 F.2d 237 (D.C. Cir. 1971). The Opinons rendered by the National Labor Relations Board, which were consolidated on appeal, appear in the Appendix hereto, and were reported as follows: *George A. Angle, d/b/a Kansas Refined Helium Company,* 176 NLRB No. 115 and 176 NLRB No. 116 (June 25, 1969).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on September 10, 1971, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED FOR REVIEW

When an employer has shown a grant of supervisory authority by uncontradicted documentary proof, must he assume the further burden of showing tangible examples of the exercise of such authority in order to prove that such supervisory authority actually exists?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§152. Definitions

When used in this subchapter: . . .

(3) The term "employee" shall include any employee, and shall not be limited to the employees of

a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

§158. Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

STATEMENT OF THE CASE

Kansas Refined Helium Company[1] (hereinafter referred to as "Employer") located at Otis, Kansas, is the largest privately owned plant in the United States engaged in the extraction and distribution of liquid helium. Construction of the plant was completed in the spring of 1966 and the Employer took over operation at that time.

The plant was staffed by "operating" employees and "maintenance" employees. Maintenance employees and top Company management (consisting of the plant manager, the operations and engineering manager, and the chief of maintenance), normally worked only during the day shift, Monday through Friday. Since the facility is in continuous operation, operating personnel were on hand 24 hours a day, seven days a week. Each shift of operating personnel was under the control of a "senior operator" who directed two or three "junior operators." Such senior operator was the top management official in charge of the plant and operating personnel during the second and third shifts and all day Saturday and Sunday.

Shortly after the Employer took over operation of the newly constructed plant, two of the four senior operators were instrumental in a drive to unionize the employees. Much of the solicitation was accomplished while the senior operators were the only management representatives on duty directing the junior operators under their control. The efforts of the senior operators and interested employees resulted in signed union authorization cards being obtained from a majority of the employees involved. On July 1, 1966,

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1. At the time of the incidents involved herein, the Company was a sole proprietorship owned and operated by George A. Angle. It was incorporated in September of 1971, and its proper name is now Kansas Refined Helium Corporation.

the Employer received a request for recognition from the Oil, Chemical and Atomic Workers Union (hereinafter referred to as the "Union") and a representation petition which had been filed with the National Labor Relations Board (hereinafter referred to as the "Board").

On August 25, 1966, the Regional Director of the Board held a representation hearing and later ruled that senior operators were supervisors.[2] Shortly thereafter, following the Employer's receipt on or about September 1, 1966, of the third in a series of anonymous letters, the Employer interviewed all personnel at the plant and discharged the two senior operators who had helped the Union drive, together with four employees.

Following such discharge, the Union filed unfair labor practice charges against the Employer. The Regional Director then reversed his position on the supervisory status of the senior operators, issued a Complaint, and filed a request for injunction in the United States District Court for the District of Kansas pursuant to Section 10(j) of the Act.

On April 5, 1967, the District Court issued the requested temporary injunction. (*Sacks* v. *Angle*, U.S. District Court for Kansas, Case No. W-3766, 65 LRRM 2098). This injunctive order was appealed by the Employer to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit modified the order to exclude senior operators from the protection of the order, since they had

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2. The Regional Director's opinion, which was issued in Case No. 17-RC-5126, appears in the Appendix hereto. The Regional Director's decision concerning senior operators was appealed by the Union to the N.L.R.B., which resulted in a ruling that the status of the senior operators would be unanswered unless the results of the election required a decision concerning their eligibility to vote.

previously been held to be supervisors by the Regional Director of the National Labor Relations Board. (*Angle* v. *Sacks*, 382 F.2d 655 (10th Cir. 1967)).

Thereafter, various hearings were held before the National Labor Relations Board which culminated in findings that the Employer had violated Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act. (*George A. Angle d/b/a Kansas Refined Helium Company*, 176 NLRB No. 115; 176 NLRB No. 116, June 25, 1969).

Knowing that the Tenth Circuit had already made a preliminary finding in the 10(j) case upholding the supervisory status of the senior operators, the Union filed a Petition for Review with the Circuit Court of Appeals for the District of Columbia.[3] The Employer objected to this change of Circuits, but the Union won its race from the Tenth Circuit to the District of Columbia Circuit because it had filed the second phase of the case in Washington before the Employer filed in Denver.

The District of Columbia Circuit then heard the case and ordered enforcement of the Board order.

In rendering its decision, the Court stated:

> "[T]he single substantive issue meriting extended exposition is the 'aging but nevertheless persistently vexing problem of whether or not an employee is a supervisor.' That inquiry here focuses on the status of the plant's 'senior operators.'" (*Oil, Chemical and Atomic Workers Union (OCAW)* v. *NLRB*, 445 F.2d 237, 240 (D.C. Cir. 1971)).

The facts revealed that the senior operators are the only managerial personnel present for many hours each day and week and that they earned 80 to 85 cents more

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3. The Court of Appeals below had jurisdiction pursuant to §10(f) of the Act, 29 U.S.C. §160(f).

per hour than their subordinates. The evidence before the Court also showed that the Employer had posted notices and directives in the plant long before the Union effort began. These notices showed that senior operators were to be "responsible" for their shift; that they were to "supervise the personnel on [their] shift"; that a particular individual had been "promoted" to senior operator to "run the fourth shift"; that "each supervisor will approve employees' time cards . . . senior operators will approve employees under their supervision"; that each senior operator "shall follow up these instructions and see that the employees take care of [particular tasks]"; and gave senior operators "authority to call out instrument men when needed." Notwithstanding these notices were posted long before the advent of the Union, the Circuit Court agreed with the Board that they were nothing more than "naked designations" of "paper power."[4] The Court then stated:

> "We agree that, beyond the statements or directives themselves, what the statute requires is evidence of actual suprvisory authority visibly translated into tangible examples demonstrating the existence of such authority." (*OCAW* v. *NLRB, supra* at 243).

Since the Court found no such tangible examples of the exercise of supervisory authority, it held that the discharged individuals were all employees protected by the Act.

REASONS FOR GRANTING THE WRIT

1. The decision below is in error and conflicts with the decisions of other Courts of Appeals as to the proper

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4. Detailed facts appear in the various decisions in the Appendix.

interpretation of the statutory definition of a "supervisor," under 29 U.S.C. §152(11).

2. The conflicting Circuit Court decisions are causing litigants to race to and from Circuits.

3. The decision below concerns an "aging and vexing" question which raises significant and recurring problems which are frustrating the purpose of the National Labor Relations Act.

1. The Decision Below Is in Error and Conflicts with the Decisions of Other Courts of Appeals As to the Proper Interpretation of the Statutory Definition of a "Supervisor," under 29 U.S.C. §152(11).

The Trial Examiner of the Board based his decision on the supervisory issue on the following statement:

> "[W]here the facts concerning supervisory status are in dispute, as they are here, I regard evidence of supervisory power *exercised—or not exercised*—as far more persuasive than self-serving testimony concerning their mere *conferral.*" (*OCAW* v. *NLRB,* 445 F.2d at 243-44). [Emphasis added].

This language was adopted by the Board and approved by the District of Columbia Circuit Court.

The Employer had contended before both the Board and the District of Columbia Circuit that a majority of the Circuits had previously ruled that it was the *existence,* rather than the *exercise,* of authority which was controlling. The Employer accused the Board of following the "minority" rule by finding that existence must be accompanied by exercise in order for supervisory status to be proven.

In its opinion, the District of Columbia Circuit attempted to negate the existence of any such "majority-minority" rule and, in fact, stated emphatically:

> "It is a well settled proposition, *mandated by the statute,* that, once the *existence* of supervisory authority is established, the degree of frequency of its *exercise* is of little consequence." (*OCAW* v. *NLRB, supra* at 244). [Emphasis added].

However, the Circuit then illogically reverses the effect of such statutory "mandate" by holding:

> "[T]he nearly total lack of evidence of [supervisory] authority *actually exercised* negates its *existence.*" (*OCAW* v. *NLRB, supra* at 244). [Emphasis added].

Thus, while the District of Columbia Circuit Court gives lip service to the proposition that "once the existence of supervisory authority is established, the degree or frequency of its exercise is of little consequence," it, in fact, requires *examples* of the *exercise* of such authority before it will conclude that such authority actually exists!

This brings us to the following clear conflict between the Circuits:

A. Majority Rule

A leading case setting forth the majority rule, *Ohio Power Co.* v. *NLRB,* was decided over 20 years ago by the Sixth Circuit. (176 F.2d 385 (6th Cir. 1949)). In substance, this majority rule holds:

> "It [Section 2(11) of the Act] does not require the *exercise* of the power described for all or any definite part of the employee's time. It is the *existence* of the power which determines the classification." (*Ohio Power Co.* v. *NLRB, supra* at 388). [Emphasis added].

A majority of the Circuits have followed the rule as announced in *Ohio Power Co.* case. The First, Second, Third, Seventh, Eighth and Ninth Circuits have cited with approval the Sixth Circuit majority rule. (*NLRB* v. *Leland-*

Gifford Co., 200 F.2d 620 (1st Cir. 1952); *NLRB* v. *Metropolitan Life Insurance Co.*, 405 F.2d 1169 (2d Cir. 1968; *NLRB* v. *Beaver Meadow Creamery*, 215 F.2d 247 (3rd Cir. 1954); *West Penn Power Co.* v. *NLRB*, 337 F.2d 993 (3d Cir. 1964); *NLRB* v. *Elliott-Williams Co.*, 345 F.2d 460 (7th Cir. 1965); *Matthews & Co.* v. *NLRB*, 354 F.2d 432 (8th Cir. 1965); *NLRB* v. *Fullerton Publishing Co.*, 283 F.2d 545 (9th Cir. 1960).

To be sure, the Circuits promulgating the majority rule have required the *existence* of the supervisory power to be a real meaningful existence. The Sixth Circuit, for example, has pointed out that:

> "The power must actually exist. Authorization *on paper* for the purpose of excluding an eligible employee from a bargaining unit, *with no intent that the power ever actually be exercised,* is not sufficient." (*Federal Compress & Warehouse Co.* v. *NLRB*, 398 F.2d 631, 634 (6th Cir. 1968)). [Emphasis added].

But true existence of such authority is sufficient whether or not the supervisor has had to exercise the same. (See *NLRB* v. *Leland-Gifford Co., supra*).

B. Conflicting Minority Rule

By contrast, the minority rule would hold that the statute requires both the *existence* and *exercise* of authority in order for an individual to qualify as a supervisor. This rule is exemplified by the District of Columbia Circuit's conclusion in the instant case as follows:

> "[*B*]*eyond the statements or directives themselves* [which had conferred supervisory authority upon the individuals involved long before the union dispute began], what the statute requires is *evidence* of actual supervisory authority *visibly translated* into *tangible examples demonstrating* the existence of such au-

thority." (*OCAW* v. *NLRB, supra* at 243). [Emphasis added].

In addition to the District of Columbia Circuit, this minority rule has found acceptance in varying degrees from the Fourth Circuit, Fifth Circuit, and Seventh Circuit. (*Food Employees Local 347* v. *NLRB,* 422 F.2d 685 (D.C. Cir. 1969); *Brewery Workers* v. *NLRB,* 298 F.2d 297 (D.C. Cir. 1961); *NLRB* v. *Southern Bleachery & Printworkers,* 257 F.2d 235 (4th Cir. 1958); *NLRB* v. *Security Guard Service, Inc.,* 384 F.2d 143 (5th Cir. 1967); *NLRB* v. *American Oil,* 387 F.2d 786 (7th Cir. 1967).

It appears that the conflict between the Circuits has arisen by virtue of an apparent conflict in the use of the term "authority" in the first portion of the definition, as opposed to the term "exercise of such authority" in the last portion of the statutory definition. The minority rule as most recently defined by the District of Columbia decision in the instant case places upon the employer the double burden of showing, first, that authority has been conferred and, second, that there are tangible examples evidencing that the authority has been actually exercised.

When, as in the instant case, the District of Columbia Circuit finds that there is "nearly a total lack of evidence of such authority having been actually *exercised,*" it then finds that the Employer has failed to meet his "double burden of proof" and strikes down the individuals' supervisory status!

By contrast, the majority rule has made it clear that conferral of authority is sufficient if there are no facts in evidence which destroy such conferral by showing it to be a mere sham. The burden is upon the party *denying* such supervisory authority to come forward with evidence which negates its true existence. In the absence of such

evidence, the conferral of power is sufficient. The First Circuit enunciated clearly the method in which the majority rule is applied when it stated, after citing the majority rule:

> "We do not take this statement to mean that mere existence in theory only of a power described in the statute is enough to make a 'supervisor.' Certainly it cannot be said that an employer can make a 'supervisor' out of a rank and file employee simply by giving such an individual a title and theoretical power to perform some one or more of the supervisory functions listed in §2(11). . . . On the other hand, we think the statute does mean that once an individual has actually been clothed with genuine power to perform a supervisory function, he thereupon becomes a 'supervisor,' *even before an opportunity arises to exercise his power, and even though he may not often find it necessary to exert the power conferred.* That is to say, one clothed with real power to discipline other employees, for instance, would be *ipso facto* a 'supervisor,' even though in a particular instance months, or perhaps in rare cases even years, might pass before any occasion ever arose calling for an exercise of the power." (*NLRB* v. *Leland-Gifford Co.*, 200 F.2d at 625).

In the instant case, the Union organizing effort took place "shortly after the employer took over the operation of [the] . . . newly constructed helium plant." (*OCAW* v. *NLRB*, 445 F.2d at 239). The evidence showed conferral of authority, together with a broad differential in pay between the supervisory senior operators and their subordinates, as well as some use of such supervisory authority even during the short period the plant had been in operation. There was no evidence of any kind that the

supervisory authority was other than the result of a good faith conferral by the Employer.[5]

In effect, the District of Columbia's opinion simply finds that if the Employer cannot prove *both* the *existence* and tangible *examples* showing *exercise* of such authority, then the supervisory status fails. This is in direct conflict with the majority rule—and the law.

2. The Conflicting Circuit Court Decisions Are Causing Litigants to Race to and from Circuits.

The Tenth Circuit, when ruling upon the appeal from the 10(j) injunction issued by the District Court for the District of Kansas, refused to define senior operators as "employees." (*Angle* v. *Sacks*, 382 F.2d 655 (10th Cir. 1967)). With this preliminary finding, it is not surprising that the Union picked up phase 2 of the litigation and raced from the Tenth Circuit to the District of Columbia Circuit where a review of the cases would show that this latter Circuit had adopted a minority rule concerning this supervisory question which would be favorable to the Union's contentions. Immediately thereafter, the Employer filed its appeal in the Tenth Circuit, but the District of

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5. In fact, the District of Columbia Circuit admits:

"Ordinarily we would find such internal memoranda and notices to be of substantial probative worth when, as here, they were prepared and circulated prior to the time that any campaign had been undertaken within the company to designate the union as the employees' bargaining representative. In such an atmosphere, untainted by live controversies over the statutory status of any particular group of employees, management's statements conferring responsibilities and allocating duties are likely to be more reliable than similar statements made in the context of union conflict when directives are often addressed as much to the Board as they are to the company's personnel." (*OCAW* v. *NLRB*, 445 F.2d at 243).

Columbia Circuit refused to relinquish jurisdiction, relying on the prior filing in that Court by the Union.[6]

Because of the differing interpretations of the statute by various Circuits and the increasing tendency for litigants to race to the Circuit most favorable to them on a particular issue, the Supreme Court needs to settle this problem.

3. The Decision Below Concerns an "Aging and Vexing" Question Which Raises Significant and Recurring Problems Which Are Frustrating the Purpose of the National Labor Relations Act.

The District of Columbia's decision contained extended discussion covering the "aging but nevertheless persistently vexing problem of whether or not an employee[7] is a supervisor." (*OCAW* v. *NLRB*, 445 F.2d at 240-44). This is probably one of the most disputed and litigated questions in labor law today. Factual situations present a myriad of disputes upon which the Board must rule, but such disputes are greatly multiplied by the increasing diversity among the various Circuits as to the interpretation of the law itself.

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6. Appeals from National Labor Relations Board decisions are somewhat unique in that they may be heard not only by the Circuit Court wherein the dispute occurred, but also in the Circuit Court of Appeals for the District of Columbia and any other Circuit where the litigant is doing business. (29 U.S.C. §160(f)). This encourages litigants to seek "favorable" Circuits.

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7. 29 U.S.C. 152(3) (1964) defines the term "employee" as follows:

> "The term 'employee' shall include any employee . . . but shall not include . . . any *individual* employed as a supervisor . . ." [Emphasis added].

Ironically, the Circuit Court itself did not use the term "*employee*" in its correct statutory sense when pondering the problem of correctly interpreting the statutory definition of a "*supervisor*."

The District of Columbia Circuit Court emphasized the far-reaching and critical nature of this controversy, as it stated:

> "[I]t is *critical*, both in ascertaining the appropriate bargaining unit and in evaluating allegations of unfair labor practices, to determine whether particular individuals are 'employees' or 'supervisors.' *Quite understandably, this statutory dichotomy has spawned substantial Board and appellate litigation.*" (*CCAW* v. *NLRB, supra* at 240). [Emphasis added].

Not only has this "statutory dichotomy" resulted in substantial Board and appellate litigation, but it has also caused increasing frustration among employers, supervisors, and employees who are called upon to define for themselves which persons are supervisors during any union organizational campaign prior to the time the National Labor Relations Board renders its decision. Obviously, an employer *cannot* instruct *employees* to refrain from being involved in such union campaigns, but it *must* order *supervisors* to refrain from such activity. It is of utmost importance, therefore, that employers be able to determine with reasonable certainty which of their personnel are employees legitimately entitled to engage in union activity, as opposed to those who are supervisors whose actions and statements must be controlled by the employer.

In addition, it is "unmistakably clear," as the Circuit Court points out in Note 4 of its opinion, that supervisors are not included within the protections afforded employees by the Act. (*OCAW* v. *NLRB, supra* at 240). Employers are entitled to oppose union efforts within the bounds of the law and to require their supervisors to adhere to this position. Prior to 1947, the National Labor Relations Board had ruled that supervisors were subject to union organization. Hearings on the Taft-Hartley Amendment made it

clear that employers were entitled to loyal supervision not subject to the influence or control of unions. (House Report, 80th Congress, First Session, pages 13-17). As a result, the Taft-Hartley Amendment removed supervisors from the protection of the Act and cast their lot with the management of the company.

The instant case is a prime example of the problems that can and do occur when disloyal senior operators (who were the only supervisors at the plant and in control of the employees for 16 hours of each day, Monday through Friday, and 24 hours on Saturday and Sunday) turn upon the Company and lead employees under their influence and control into union organization. Employers must be able to determine which of their personnel are supervisors to carry out not only employer responsibilities, but also employer rights under the law. This ability is presently in jeopardy due to the conflicting decisions among the various Circuits concerning the statutory definition of the term "supervisor."[8]

Employees are also entitled to know which individuals are supervisors. Obviously, employees are quite likely to sign union cards when a person they understand to be their supervisor (especially one who has been officially cloaked with this authority by repeated statements and written directives of the Company, as in the instant case) "suggests" to such employees that they do so.

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8. The "vexatiousness" of the problem is underscored in the instant case by the fact that the Regional Director himself wandered and was inconsistent in his decision. *Prior* to the discharge, the Regional Director found the senior operators to be supervisors. However, immediately *after* their discharge occurred, he reversed his position and prosecuted the Company for such discharges. It is apparent that the Employer was not safe in the instant case in making such discharges even when relying on the original opinion of the Regional Director.

In view of these facts, it is of utmost importance that the Supreme Court finally review and make a definitive determination as to the actual meaning of the statute defining supervisors. Failure to do so is resulting in increasing uncertainty and unnecessary litigation.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE

OCTOBER TERM, 1971

GEORGE A. ANGLE, d/b/a KANSAS REFINED
HELIUM COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-597

GEORGE A. ANGLE, d/b/a KANSAS REFINED HELIUM COMPANY, PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A22) is reported at 445 F. 2d 237. The decisions and orders of the Board (Pet. App. A22-A166), which were consolidated for purposes of this proceeding, are reported at 176 NLRB Nos. 115 and 116.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1-A2) was entered on September 10, 1971. The petition for a writ of certiorari was filed on October

29, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the facts of this case, the Board properly found that the company's "senior operators" were employees rather than supervisors, and thus protected by the National Labor Relations Act.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 2-3. Section 8(a)(1) is also relevant, and provides:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; • • •

STATEMENT

In mid-June 1966, the Oil, Chemical and Atomic Workers Union began an organizing campaign at the plant of the Kansas Refined Helium Company, located in Otis, Kansas, and owned by George Angle.[1] The Union obtained signed authorization cards from 18 of the 22 production and maintenance personnel;

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[1] The plant had recently been constructed for Angle by American Messer Corporation, which had hired and trained the personnel to run it (Pet. App. A30).

Angle, when notified of this, asked for a Board election (Pet. App. A31-A32).

During the months before the scheduled election, the Company, through Angle, engaged in extensive activities which the Board found were unfair labor practices, in violation of Section 8(a)(1), (3), (4), and (5) of the Act (Pet. App. A24, A78, A120-A121, A138-A139, A161-A162). As a remedy for these unfair labor practices, the Board, *inter alia*, ordered the Company to bargain with the Union upon request (Pet. App. A24, n. 4, A119-A120, A122). The court below held that the Board's unfair labor practice findings were supported by substantial evidence and that the remedial measures ordered were appropriate (Pet. App. A5-A6, A16-A22). The petition does not challenge most of the court's decision; the only claim is that the Company's "senior operators" were "supervisors" as defined in Section 2(11) of the Act, and not, as the Board found and the court below sustained, "employees" protected by the Act.

The facts relative to this issue are not disputed and may be summarized as follows. The plant is supervised by the plant manager (Plant Manager Owens), the operations and engineering manager (Plant Engineer Tyler), and the chief of maintenance (Maintenance Manager Stiff). It employs approximately 24 persons, consisting of "instrument men" (who repair and maintain the gauges and similar devices), general maintenance employees, an electrician, a clerk, and operating personnel. The operating employees monitor the various gauges and take the necessary steps to assure that the automatic process follows its

assigned course; they are classified either as "senior operators" (of whom there are four) or as "junior operators," and the only issue here is the status of the former. (Pet. App. A31, A39.)

Each shift consists of one senior operator and two or three junior operators. The senior operator's principal duty station is at a large bank of indicators (called "the board") in the main control room at the principal building. The junior operators move about the plant area, covering the machines and controls in the outbuildings and on the pipelines between the various tanks and buildings. It is not unusual, however, for a junior operator to take the senior's place at the board for intervals during a shift. (Pet. App. A38; R. 34, 48-49.[2]) All operators have standing instructions, through a manual called the "blue book," to perform certain duties with respect to particular machines during every shift.

Additional instructions for performing tasks made necessary by unusual circumstances are set forth in a "special orders book" prepared by top management. Senior and junior operators consult the special orders book at the commencement of each shift for their assignments during their shift. (Pet. App. A40; R. 31-32, 76, 138-139.) At the end of the shift, the senior operator usually consults this book again to make certain that all assignments have been completed. If his inspection of the book and, possibly, of the machinery, discloses that an assignment to be performed by a junior operator has not been carried

[2] "R." references are to the appendix in the court of appeals.

out, he notifies the appropriate junior operator. (Pet. App. A40-A41; R. 49-50, 52, 54.)

During the regular daytime hours—8 a.m. to 4 p.m., Monday through Friday—the operating crew on that shift and the other plant employees (supervisory, maintenance, and clerical) are on duty. From 4 p.m. each day until 8 the next morning and during weekends, only the operating crew on those shifts normally is at the plant. (Pet. App. A40; R. 35.) Plant Manager Owens, Plant Engineer Tyler, and Maintenance Manager Stiff all reside in the vicinity, however, and, if any unusual problem arises during the night or weekend, the senior operator informs Tyler, who gives the necessary direction, sends down a maintenance man, or comes to the plant himself (Pet. App. A41; R. 36, 48, 50, 136-137). It is not unusual for Tyler or Owens to spend many hours at the plant during nights and weekends, either because they elect to do so or because operating problems or outside emergencies, such as storms, require it (Pet. App. A41; R. 74-75, 136).

Plant Engineer Tyler testified that the senior operators had no authority to discipline junior operators. This was illustrated by an incident during the spring of 1966, involving senior operator Sims and a junior operator named Stahlman. The junior operator had refused to perform a task falling within the regular scope of his duties and Sims reported the matter to Tyler. After giving it some thought and consulting with other officials, Tyler informed the senior operators that they had no disciplinary powers over the juniors and that, if a situation should arise involving

the possible need for disciplinary action, they were to call him and he would take the necessary action. (Pet. App. A41-A42; R. 47, 49, 135.)

On these facts, the Board rejected the Company's contention that the senior operators were supervisors. It adopted the Trial Examiner's decision (Pet. App. A24), thus affirming his finding that the senior operators were, "at most, leadmen and * * * not supervisors" (Pet. App. A50). The Examiner explained this finding as follows (Pet. App. A49-A50):

> The outstanding characteristic of the operation of this plant is that each operator in it, senior and junior alike, had and performed specific, preassigned tasks to keep it running. Practically all of the so-called directions by senior operators to juniors consisted of (i) calling the junior's attention to functions he was required to perform and which he had neglected to perform by reason of oversight or inability to see the indicator calling for its performance, (ii) on the basis of greater experience, advising the junior how to perform one of his assigned tasks, or (iii) cooperating with the junior in the performance of a task that required joint performance.[3]

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[3] The Examiner also found that the 80-85 cents per hour pay differential between the senior and junior operators was due to the superior skill of the senior operators (Pet. App. A43-A44; R. 135, 140); that the senior operators had no power effectively to recommend wage increases (Pet. App. A42-A43; R. 72-73, 110); and that, although senior operators did sign the time cards of junior operators, the cards were not valid until they had also been signed by Plant Engineer Tyler (Pet. App. A45; R. 75, 137). The Company's contention that intra-plant notices granted supervisory authority to the

The court of appeals sustained the Board's findings and enforced its order (Pet. App. A4-A21). It stated that "we find substantial evidence to support the finding that the senior operators were not supervisory personnel within the contemplation of the statute but were merely 'lead men' among the operating employees on each shift" (Pet. App. A15).

ARGUMENT

The record in this case does not present the question stated in the petition (Pet. 2)—whether "an employer [who] has shown a grant of supervisory authority by uncontradicted documentary proof, must * * * assume the further burden of showing tangible examples of the exercise of such authority in order to prove that [it] actually exists." For the premise is missing, since the Examiner concluded that the Company's "documentary proof" did not show that the senior operators had supervisory powers and it was inconsistent with their actual duties (see n. 3 *supra*). The Board adopted this finding, and the court of ap-

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senior operators was rejected; the Examiner pointed out that, of the seven notices, four were "purely conclusionary * * * [with] no factual recital of any of the functions of [the senior operators]" (Pet. App. A46; R. 481, 482, 483, 484); one granted authority to initial, but not to validate, time cards (Pet. App. A46-A47; R. 482); one simply listed the telephone numbers where instrument men could be reached when none was on duty at the plant (Pet. App. A47; R. 486); and the last merely added to the assigned duties of all operators, both senior and junior (Pet. App. A47; R. 485). Finally, the Examiner found that "the senior operators themselves do not appear to have been under the impression that they were supervisors * * *." (Pet. App. A47).

peals held that substantial evidence supported it (Pet. App. A13-A15).

In this circumstance, there is no basis for petitioner's contention (Pet. 8-13) that the court below departed from the principle applied by other courts of appeals—*i.e.*, that it is the existence of supervisory power, and not the frequency of its exercise, which determines supervisory status under Section 2(11) of the Act. *National Labor Relations Board* v. *Leland-Gifford Co.*, 200 F. 2d 620, 625 (C.A. 1); *Ohio Power Co.* v. *National Labor Relations Board*, 176 F. 2d 385, 386, 388 (C.A. 6). Indeed, the court below explicitly recognized the general validity of this principle, and concluded that the decision here fully comports with it (Pet. App. A14-A15).

On the record here, then, the only issue is whether substantial evidence supports the finding that the senior operators did not possess actual supervisory authority. The court below carefully canvassed the factual setting and correctly concluded that substantial evidence supported that finding. In any event the issue, turning as it does on the particular facts presented, does not warrant further review.[4]

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[4] There is no conflict between the decision of the court below and that of the Tenth Circuit in *Angle* v. *Sacks*, 382 F. 2d 655, affirming, with modification, the interim injunction issued by the district court in connection with the dispute here under Section 10(j) of the Act, 29 U.S.C. 160(j). To be sure, the Tenth Circuit excepted senior operators Rodgers and Sims from the district court's reinstatement order, noting that the Board's Regional Director had ruled that they were supervisors and not eligible to vote in the representation election which he had directed. However, the Tenth Circuit

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1971.

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did not approve the Director's decision, but merely concluded that, since the Board had later directed that these senior operators be allowed to vote subject to challenge, the "temporary reinstatement of Sims and Rodgers is not necessary to protect the efficacy of a final order by the Board regarding the status of senior operators. * * *" 382 F. 2d at 661.

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